

DOL Modernizes Disclosure Rules in a Significant Expansion of Electronic Delivery

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On October 23, 2019, the Department of Labor (“DOL”) proposed a new electronic disclosure safe harbor. The proposed rule, “Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA” (“Proposed Rule”),¹ provides an additional safe harbor for the furnishing of pension plan information and disclosures to participants, beneficiaries and alternative payees. The proposed safe harbor could lead to a dramatic expansion in the use of electronic media to furnish retirement plan communications as well as significant financial savings for plans. For now, welfare plan disclosures (e.g., COBRA Notices and notices of adverse benefit determinations for group health and disability plans) are excluded from the Proposed Rule, leaving plan sponsors in the awkward position of having to comply with different disclosure rules for different plans. The comment period is short; comments must be submitted no later than November 22nd.

If finalized, the Proposed Rule could lead to a dramatic expansion in the use of electronic media to furnish retirement plan communications as well as significant financial savings for plans. However, the Proposed Rule was not entirely plan sponsor friendly. DOL limited the new safe harbor to retirement plan documents and information stating that “as proposed, [the safe harbor] does not apply to employee welfare benefit plans, as defined in section 3(1) of ERISA.” Rather DOL is still reviewing the impact that electronic disclosure could have on welfare plan disclosures and has indicated it may propose a separate rulemaking for those plans. Additionally, the Proposed Rule would supersede the widely used “continuous access website” rule for pension benefit statement information from Field Assistance Bulletin 2006-03 (“FAB 2006-03”), likely resulting in fewer participants receiving their pension benefit statements electronically. DOL also eliminated a key rule for QDIA notices -- the ability to rely on either one of the DOL or the IRS electronic delivery rules. Finally, the Proposed Rule

¹ Found at <https://www.federalregister.gov/documents/2019/10/23/2019-22901/default-electronic-disclosure-by-employee-pension-benefit-plans-under-erisa>

leaves open a number of questions including whether and when certain notices and documents can be removed from a plan's website.

The new safe harbor relies on a "notice and access" approach. In this regard, the Proposed Rule provides a pathway for plan administrators to satisfy their document and notice delivery obligations by posting required disclosures on a website while also delivering an electronic notice of availability. In a stark departure from the current DOL safe harbor, the Proposed Rule imposes no requirements on plan administrators 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 Proposed Rule establishes a framework that identifies "covered individuals" to whom "covered documents" may be provided, as long as additional requirements of the safe harbor are met. We describe the conditions of the new safe harbor below, noting a few observations.

- *Covered Individuals.* The Proposed 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 administrator (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. The electronic address that may be used for purposes of the regulation is technology neutral, and imposes no requirements with respect to the type of device that may be used for receipt (whether a smartphone, tablet, laptop or other internet-connected device).

GROOM INSIGHT | The term "covered individual" broadly includes any participant, beneficiary or alternate payee, regardless of employment status, who has provided an electronic address to the employer, sponsor or administrator. Unlike the DOL's current safe harbor, the new proposed safe harbor would not require any electronic confirmation of the covered individual's ability to access the electronic address he or she provided. Additionally, as noted above, an employer could assign active employees an electronic address and the employee would be treated the same as if he or she provided the address. This is true even if the address is assigned solely for purposes of satisfying the safe harbor.

- *Covered Documents.* "Covered documents" are defined as any document that the plan administrator is required to furnish participants and beneficiaries under Title I of ERISA, except for any document that must be furnished upon request.

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GROOM INSIGHT | Welfare plan disclosures are excluded from the safe harbor. We expect that many plan sponsors may want to comment to the DOL urging that at least some types of health and welfare plan documents be eligible for electronic delivery under the safe harbor. Additionally, it is not clear whether technically optional disclosures, such as mapping notices in connection with 401(k) plan investment option transitions, are included within the safe harbor, but this may be a point worthy of clarification.

- *Notice of Internet Availability.* The Proposed Rule generally requires the plan administrator to furnish a “Notice of Internet Availability” (“Notice”) for each covered document provided using the new safe harbor. Notices must meet certain content requirements. The Notice must generally be provided at the time the document is posted on the website and must include—
 1. A prominent statement or title that reads, “Disclosure About Your Retirement Plan,” as well as the following statement -- “Important information about your retirement plan is available at the website address below. Please review this information.”
 2. A brief description of the document.
 3. The internet website address where the document is available. The website address must be sufficiently specific to provide ready access to the covered document.
 4. A statement of the right to request and obtain a paper version of the document, free of charge, and how to obtain the paper version.
 5. A statement of the right to opt out of receiving covered documents electronically, and an explanation of how to opt out.
 6. A telephone number to contact the plan administrator or designated representative of the plan.

The Notice must be: (1) furnished to the electronic address, (2) limited to only the content specified by the regulation (logos or other design elements may be used as long as the content is clear and not misleading), and (3) calculated to be understood by the average plan participant. Multiple covered documents can be announced in a single Notice of Internet Availability subject to the special rule described below.

GROOM INSIGHT | In a first, DOL has provided an explanation of what it means for a document to be calculated to be understood by the average plan participant, stating that a notice that uses short sentences, everyday words, active voice, avoids double negatives and has a Flesch Reading Ease test score of at least 60 would satisfy this requirement. As a reference, according to Word, this document has a Flesh score of 25.

- *Website Standards.* The plan administrator is required to ensure the existence of the website that is being used to post the covered documents, and to ensure that the website meets certain

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minimum standards. Specifically, the plan administrator must take measures reasonably calculated to ensure that:

1. the covered document is available no later than the date it is required to be furnished,
2. the document remains available until it is superseded by a subsequent version,
3. the covered document is searchable,
4. the document is maintained in a widely-available format that allows the document to be permanently retained (such as in PDF form), and
5. the website protects confidential information.

GROOM INSIGHT | The Proposed Regulation specifically references a “website.” It is not entirely clear whether this would exclude the use of other sorts of electronic delivery, such as those involving internet fragments and smart phone applications. Depending on the answer, this could limit the utility of the new safe harbor as individual electronic ecosystems become more common.

- *Right to Request a Paper Version or Opt Out.* The plan administrator is required to provide paper versions of covered documents upon specific request, to comply with requests to opt out of electronic disclosure entirely, and to maintain procedures governing these requests. In addition, the system for furnishing a Notice must alert the administrator of an invalid or inoperable address. The plan administrator is required to maintain procedures designed to resolve the invalid address such as by sending the notice to a secondary address, obtaining a new address from the individual, or treating the individual as if they opted out of electronic delivery.

GROOM INSIGHT | The requirement to resolve inoperable or invalid addresses appears to be stricter than DOL’s current electronic disclosure safe harbor. Under the current safe harbor regulation, a plan administrator is required to take appropriate measures to ensure that the electronic system results in actual receipt, however this requirement could be satisfied through periodic plan-wide surveys. The Proposed Rule would require the plan administrator to take specific action, on a participant-by-participant basis, each time a notice of invalid address is received. Importantly, DOL states that “[s]o long as the plan administrator is not alerted to an invalid or inoperable address, and the other conditions of the proposed safe harbor are satisfied, the administrator is considered to have furnished the pension documents required under Title I of ERISA.”

- *Initial Notice of Internet Availability.* Prior to relying on the safe harbor for any covered individual, the plan administrator is required to provide a notification *on paper* that explains that some covered documents will be provided electronically to an electronic address, and an explanation of the rights to request a paper version of any document and the right to opt out of

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electronic delivery. This *paper* notice would be required both before a plan administrator begins to rely on the safe harbor after its effective date, and when employees are newly hired over time.

GROOM INSIGHT | DOL clarifies that this initial notice must be provided in paper form, regardless of whether the plan administrator is currently relying on DOL's current electronic safe harbor.

- *Severance from Employment.* A special rule provides that the plan administrator must take measures calculated to ensure the continued accuracy of the electronic address following a severance from employment, or to obtain a new address that enables receipt of covered documents following the severance.

GROOM INSIGHT | This is an interesting addition by the DOL; no doubt designed reduce the number of missing participants in pension plans over time. In this regard, missing participants have been a prominent focus of DOL pension plan investigations for several years. DOL specifically requested comment on the applicability of this provision to multi-employer plans.

- *Special Rule for Consolidating Multiple Notices.* Although the Proposed Rule generally envisions providing a new Notice of Internet Availability in connection with each new covered notice posted on a website, the Proposed Rule permits certain regular recurring disclosures to be announced in a single Notice provided annually. Specifically, the plan administrator may announce the availability of the following disclosures in a single Notice of Internet Availability provided once within a 14-month period:
 - Summary plan descriptions (SPDs);
 - Summaries of material modification (SMMs);
 - Summary annual reports (SARs);
 - Annual funding notices;
 - Comparative investment-related disclosures provided by participant-directed individual account plans under DOL's 404a-5 regulation;
 - QDIA notices; and
 - Pension benefit statements required by ERISA section 105.

Temporary Unavailability of Covered Documents. In a special rule helpful to plan administrators, the Proposed Rule provides that the plan administrator will not fail to be in compliance with the Proposed Rule in the event that the covered documents become temporarily unavailable due to unforeseeable events or circumstances beyond the control of the plan administrator, provided the plan administrator has procedures in place to ensure the documents are available and the

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plan administrator takes prompt action to cure any unavailability as soon as practicable following knowledge of the problem.

In addition to the Proposed Rule, the DOL published an RFI asking specific questions about the use of electronic media to furnish notices. The RFI delves into the content, style, timing and effectiveness of ERISA plan disclosures. With these questions, it appears DOL is gathering information for potential use in overhauling, not just the manner plans communicate with participants, but what they communicate, when they communicate it, and to whom such communications are furnished. Importantly, DOL also appears to be trying to determine how to evaluate the effectiveness of specific disclosures. It seems to us that evaluating the effectiveness of disclosures is greatly facilitated by expanding electronic disclosure, which may permit plans to track how many participants open and act upon a notice. This kind of tracking is impossible in a system that relies on paper disclosures.

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