

DOL E-Disclosure Rule is Submitted to OMB

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On April 16th, the Office of Management and Budget (“OMB”) received the Department of Labor’s (“DOL”) long anticipated final regulation updating and modernizing the rules for using electronic media to furnish ERISA-required disclosures and notices; *Default Electronic Disclosures by Employee Pension Benefit Plans Under ERISA* (the “Final Rule”). DOL’s existing electronic disclosure rule has been in place for nearly two decades and was developed long before the widespread adoption of many current electronic communications methods. During the current COVID-19 crisis, a number of plans have expressed concerns about how to communicate with participants about market volatility and plan changes, especially where many are now expressing concerns about health risks associated with paper mailings. DOL’s rule should not only modernize DOL’s electronic disclosure standards, but also address communication concerns specifically raised by the current health crisis.

On October 28, 2019, Groom Law Group **published a summary** of the proposed rule modernizing DOL’s electronic disclosure regulations (the “Proposed Rule”). Because of its design, the Proposed Rule had the potential to lead to a dramatic expansion in the use of electronic media to furnish retirement plan communications, as well as significant financial savings for plans associated with the ability to move away from paper communications. By relying on a “notice and access” approach, the Proposed Rule provided a pathway for plan administrators to satisfy their disclosure delivery obligations by posting required disclosures on a website while also delivering an electronic notice of availability to participants. In a stark departure from the current DOL safe harbor, the Proposed Rule did not require plan administrators to analyze whether individual participants interact with an electronic system as a function of their job; nor did it impose any specific requirements that participants affirmatively consent to electronic delivery. Importantly, the Proposed Rule allowed plans to use an employer-assigned electronic address to deliver the notice of availability to all participants who did not opt out of electronic disclosure.

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However, the Proposed Rule was not all encompassing. Specifically, it was limited to retirement plan disclosures, reserving any improvement to the electronic disclosure rules for employee health and welfare plans to future rule making. While the Final Rule is not yet publicly available, given the fact that its name has not been updated on the OMB website, it appears unlikely that DOL has expanded the rule's scope to include health and welfare plans. It is very possible, however, that other concerns resulting from the Proposed Rule have been addressed. Specifically, we are hopeful that the Final Rule will undo the Proposed Rule's removal of the widely-used special rule under Field Assistance Bulletin 2006-03 allowing pension benefit statement information to be provided via a "continuous access website."

Under Executive Order 12866, OMB has up to 90 calendar days (or 120 days with an extension) to review and comment on the Final Rule but may permit a shorter review in exigent circumstances. This deadline is important since DOL will need to submit the Final Rule to the U.S. House of Representatives, the U.S. Senate, and the General Accounting Office at least 60 days before the Final Rule can take effect for review under the Congressional Review Act. Under this timeline, even if finalized before the election, Congress could still block the Final Rule from becoming effective, particularly in the event of a change in administration.

The Final Rule is expected to be effective beginning 60 days after it is published in the Federal Register. We will send out a client alert when the Final Rule is published.

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