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Deeper Dive into the new Proposed Electronic Disclosure Safe Harbor

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In April 2011, the U.S. Department of Labor (DOL) requested information from the public on how the DOL could structure a new safe harbor for electronic disclosures under ERISA. The DOL received hundreds of comments from employers and plan sponsors due to this request. Eight years later the DOL has finally answered the call by issuing a proposed new regulation to establish an alternative safe harbor for employee pension benefit plans to provide required ERISA disclosures electronically.

The proposal is designed to be an alternative to, rather than a replacement of, the existing disclosure rules. This means that the existing safe harbor for electronic disclosures under DOL Regulation Section 2520.104b-1(c), as well as the general rules under DOL Regulation Section 2520.104b-1(b)(1) are still available for electronic distributions of required ERISA disclosures.

Application of Proposed Regulations

As proposed, the new safe harbor would apply only to retirement benefit plan disclosures, not employee welfare benefit plan disclosures. In that regard, the DOL stated that it is reserving guidance for welfare benefit plans so that it can study the future application of the new safe harbor to documents that must be furnished by welfare benefit plans. This reservation follows the directive of Executive Order 13847, which focuses the DOL's review on retirement plan disclosures. However, in the preamble, the DOL noted that it does not interpret the Executive Order's directive as limiting the DOL's ability to issue additional safe harbors for welfare benefit plans, as any new safe harbor would reduce plan administrative costs and improve the effectiveness of disclosures. The DOL concluded by noting that the DOL would have to consult with the IRS and HHS regarding any additional safe harbors for welfare benefit plans. This is an interesting statement given the fact that the DOL has exclusive jurisdiction over ERISA disclosures, such as SPDs and SMMs. Thus, we presume DOL is referring to other health plan disclosures, such as SBCs and Part D Notices.

New Proposed Safe Harbor

The proposed safe harbor for retirement plans adopts a "notice and access" structure that is similar to the structure described in DOL FAB 2006-03 applicable to providing retirement plan statements electronically. Accordingly, a website posting in conjunction with a properly timed notice of internet availability constitutes "furnishing" for purposes of ERISA retirement plan disclosures. The highlights of the proposed regulation are as follows:

1. Who May Receive Electronic Disclosures?

A "covered individual" includes any participant, beneficiary, or other individual entitled to receive the information who, as a condition of employment, at commencement of plan participation, or otherwise provides the plan administrator with an electronic address (which includes a personal email address or a number associated with a smart-phone or tablet). This requirement is satisfied without significant burden when an employee is assigned a company email address upon employment. However, the individual may opt out of electronic disclosures.

> Comment: Under the current electronic disclosure safe harbor, only two categories of individuals may receive electronic disclosures – those who are "wired at work" (i.e., access to the employer's electronic information system is an integral part of duties) and those who affirmatively consent to receive documents electronically.

2. What Documents May Be Furnished Electronically?

The proposed safe harbor may be used to furnish any document the plan administrator is required to furnish to participants and beneficiaries, except for any document that must be furnished upon request. In general, there are two categories of "covered documents" – documents that must be furnished with the passage of time (e.g., benefit statements or summary annual reports) and documents that must be furnished because of a specific triggering event (e.g., an SMM or a blackout notice).

> Comment: A plan administrator is not required to furnish all documents using the new safe harbor. If preferred, a different method of furnishing some documents may be utilized.

3. How Does the Plan Administrator Adopt the New Safe Harbor for Electronic Delivery?

To qualify for the safe harbor, all "covered individuals" must receive a paper copy of an initial notice that by default, some or all future disclosures will be made electronically. That notice will inform covered individuals that they have a right to receive paper copies of all notices, and provide information on the procedure to opt out of the electronic disclosures default.

4. What is the Notice of Internet Availability?

Unless a covered individual takes affirmative steps to opt out, the covered individual will be defaulted into electronic disclosure. For each disclosure required under ERISA, those covered employees can be sent electronically a "notice of internet availability" that includes:

- A prominent statement that reads "Disclosure about your Retirement Plan"
- A further statement that "Important information about your retirement plan is available at the website address below. Please review this information."
- A brief description of the covered document.
- The internet website specific enough to provide ready access to the covered document.
- A statement of the right to receive a paper copy of the covered document free of charge and how to exercise this

right.

- A statement of the covered individual's right to opt out of electronic disclosure and how to exercise this right.
- A phone number to contact the administrator or other designated representative.

The notice of internet availability must be sent electronically to the participant's email address at the time the covered document is posted on the website. The proposed regulation provides a special rule that allows an administrator to combine notices annually for certain covered documents that are common and recurring (e.g., summary plan description, summary annual report, qualified default investment alternative, pension benefit statement). The proposed regulations also provide a special rule for participants who terminate employment to address the concern about the accuracy of the contact information and ensure a seamless transition for the dissemination of plan information.

5. Can Plan Administrators Immediately Adopt the New Safe Harbor?

No. The proposal does not provide the ability to rely on the new safe harbor for electronic disclosures currently. Administrators may begin taking advantage of the new safe harbor for electronic disclosure at any time on or after January 1 following publication of the final rule.

Looking Forward

There are many technical details in the proposed regulations and the possibility of more resulting from comments the DOL will receive. To date, comments have been received by the DOL advocating for and against the new safe harbor. Typically, organizations representing former, retired and/or older participants are against adopting the new safe harbor.

In this respect, the DOL is missing a huge opportunity to simplify the new safe harbor even more. If the DOL bifurcated active employees and former / retired employees, the DOL would be able to tailor a safe harbor specifically to these groups. For a number of years, plan sponsors have required employees to change deferral elections, beneficiary designations, request distributions and change investment elections solely via an internet website (or a smartphone application). These types of changes can no longer be made via paper and for most plan sponsors cannot even be made over the telephone.

If an active employee is required to use a computer or other mobile device to make these simple 401(k) plan changes, the DOL could certainly simplify the safe harbor by allowing electronic disclosure to active employees without any opt outs. The reality is that by requiring the plan administrator to have a procedure to mail written materials upon request, this serves as an opt out for the particular items requested without the need to maintain opt out lists. Such a simplified rule for active employees would simply administration allowing plan sponsors to publish all materials on a website for active employees without the need to maintain costly opt-out lists or to use different procedures for different groups of active employees. Plan sponsors would only need to send the active employee a notice that a document or documents have been posted. If an active employee does not have access to a printer, or would simply just like a paper copy, the employee could exercise the document-specific "opt out" by calling the number and requesting a paper copy be mailed to his/her home address.

For former and retired employees, a different safe harbor can be used. One that is tailored to the specific and unique needs

of that population.

The DOL will finalize the new regulations likely mid-year 2020.