

# U.S. Department of Labor Issues New Guidance on Electronic Disclosures under Participant Fee Disclosure Regulations

October 10, 2011

The US Department of Labor (DOL) recently issued Technical Release No. 2011-3 (the Technical Release), which sets forth new guidance regarding the use of electronic media to comply with the fee disclosure requirements for participant-directed individual account plans. These requirements, which generally apply beginning on or after May 31, 2012,<sup>[1]</sup> require plan administrators to disclose to plan participants and beneficiaries both plan-wide and individual fees and expenses that may be charged against the plan accounts. (See our [client alert: Department of Labor Extends Deadlines for Fiduciary and Participant Level Disclosures](#).)

## DOL Electronic Disclosure Rules Generally

The DOL previously has released guidance on the electronic delivery of information. Under the DOL's "safe harbor" rule,<sup>[2]</sup> electronic disclosures are permitted so long as they are furnished using measures reasonably calculated to ensure that the system furnishing the information actually delivers the information in a manner consistent with the style, format and content of the applicable document, while protecting the confidentiality of the recipient's accounts and benefits. Under the safe harbor, the recipient of an electronic document must be provided (either electronically or non-electronically) with a notice that describes the document's significance and informs the individual that he or she has a right to request the information in paper form. Further, the safe harbor only applies to information furnished to: (a) a participant who can access electronic documents where he or she is reasonably expected to perform work and uses the employer's (or plan sponsor's) electronic information system as an integral part of his or her work duties; and/or (b) any individual who affirmatively consents to receiving disclosures electronically in accordance with the safe harbor's consent provisions.

## Disclosures Included in Pension Benefit Statements

The Technical Release treats disclosures differently based on whether the information disclosed is included in a pension benefit statement. Under the Technical Release, if a pension benefit statement is delivered electronically (e.g., via a Web site), then certain fee disclosure information also may be delivered through the same electronic means (e.g., through the same Web site). Note, however, that the electronic delivery of the plan benefit statement must be in accordance with DOL regulations. In 2006, the DOL released Field Assistance Bulletin 2006-3 (FAB 2006-3) to provide guidance regarding compliance with the changes made to pension benefit statement requirements pursuant to the Pension Protection Act of 2006. FAB 2006-3 provided that pension benefit statements may be provided through the DOL's safe harbor, or, alternatively, through a method of electronic delivery developed by the Department of the Treasury. The Treasury Department guidance, while similar to the DOL's safe harbor, does not make an exception for individuals who can access the disclosures electronically at work. (For more information on FAB 2006-3, see our [client alert: The U.S. Department of Labor and the Treasury Department Issue PPA Guidance](#). For information on the Department of the Treasury's guidance, see our [client alert: Treasury Department Issues Final Rules on Electronic Media Use for Notices and Participant Elections](#).)

### **Disclosures Not Included in Pension Benefit Statements**

If, however, the required disclosures are *not* included in a pension benefit statement, the plan administrator may not use the Treasury Department's disclosure method. The Technical Release instead provides that plan administrators may disclose information electronically by relying on the DOL safe harbor, or, alternatively, via a method outlined in the Technical Release itself.

Under the Technical Release method, plan administrators may disclose information electronically if all of the following conditions are met:

- The individual must voluntarily provide his or her email address to the employer, plan sponsor, or plan administrator. An email address provided as a condition of employment will not be considered to have been provided "voluntarily."
- The email address must be provided in response to a request, provided along with a clear, conspicuous "initial notice" that: (1) states that providing an email address is voluntary; (2) describes the information that will be furnished electronically and how the individual can access it; (3) informs the individual that he or she has the right to a free paper copy of the information; (4) informs the individual of his or her

right to opt out of receiving information electronically at any time; and (5) explains the procedure for updating the individual's email address.

- The plan administrator must furnish an annual notice containing substantially the same information as described in items (2) through (5) in the bullet point immediately above. The notice must be on paper, unless the individual has interacted electronically with the plan at any time after the date the previous year's annual notice was furnished, in which case it can be delivered to the individual's email address.
- The plan administrator takes appropriate measures to ensure that the electronic delivery system results in actual receipt of the information, and that the system protects the confidentiality of personal information.
- The notices must be written in a manner calculated to be understood by the average plan participant.

The Technical Release contains a "Special Transition Provision" that applies with respect to email addresses of participants and beneficiaries that are already on file with the employer, plan sponsor or plan administrator. The Special Transition Provision allows a plan administrator to satisfy the "initial notice" requirement for these individuals by sending the initial notice (minus the statement that providing an email address is voluntary) to that individual's email address on file, provided the individual has interacted electronically with the plan within twelve months prior to furnishing the notice. An email address provided by the employer or plan sponsor may not be used unless there is evidence the email address has been used for plan purposes by the individual within twelve months prior to furnishing the notice. Such notice must be furnished no earlier than ninety and no later than thirty days before the initial disclosures are required. Thus, while initial disclosures will not have to be made until earliest May 31, 2012, plan administrators of calendar-year plans are required to provide the "transition group initial notices" no later than May 1, 2012.

For more information on electronic disclosure requirements, please contact an employee benefits lawyer at Proskauer.

[\[1\]](#) The new disclosure requirements apply for plan years beginning on or after November 1, 2011. However, according to DOL guidance issued in July 2011, initial disclosures must be provided 60 days after the start of the plan year, but no earlier than May 31, 2012. See our [client alert: Department of Labor Extends Deadlines for Fiduciary and Participant Level Disclosures](#).

[2] 29 C.F.R. § 2550.104b-1(c).

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