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Practice Update

United States Department of Labor Expands Electronic Delivery Rules for Retirement Plans

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The United States Department of Labor (DOL) finalized a new safe harbor rule for the use of electronic media to furnish information to participants and beneficiaries of employee retirement plans subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA). The new electronic delivery regulation does not apply to health and welfare benefit plans so those plans should continue to look to previous guidance concerning when and under what circumstances electronic delivery is permissible.

The new safe harbor is a welcome change for retirement plan sponsors and administrators because it broadens the availability of electronic notices, thereby reducing the costs associated with furnishing hard-copy notices. In general, under the new framework, a plan administrator sends notice to an electronic address (such as email) either providing the required document or informing the recipient that a new document is available on the plan's website. Importantly, however, individuals who prefer to receive paper disclosures can request them and opt out of electronic delivery entirely. In this alert, we review the key components of the new regulation.

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Background

The DOL's regulations implementing ERISA require administrators of employee benefits plans to disclose certain information to participants, beneficiaries, and certain other specified individuals. *See* 29 C.F.R. § 2520.104b-1. Plan administrators must furnish retirement plan materials at specified times and upon an individual's direct request. Plan administrators must also make the required retirement plan documents available to participants and beneficiaries for inspection at reasonable times and places. Information that is required to be furnished must be sent by a method or methods of delivery likely to result in actual receipt of the information by each participant. For many years, this meant hand-delivering or mailing paper notices to participants and beneficiaries. The necessity of paper notices began to change with the advent of the internet and email.

In 2002, the DOL provided a safe harbor for certain electronic disclosures ("the 2002 Safe Harbor"). *See* 29 C.F.R. § 2520.104b-1(c). The 2002 Safe Harbor was limited to two categories of participants and beneficiaries:

1. Employees who are "wired at work" – that is, employees with access to the electronic disclosures at their job location and for whom access to the employer's electronic information system is an integral part of their employment duties; and
2. Individuals who affirmatively consent to receive documents electronically.

The DOL explained in the final regulation that the 2002 Safe Harbor remains in place and the new rule is simply an alternative option for plan administrators to utilize. However, plan administrators should be aware that other prior DOL guidance – specifically, Field Assistance Bulletin 2006-03, Field Assistance Bulletin 2008-03 (Q&A 7), and Technical Release 2011-03R (Dec. 8, 2011) – are

superseded, and can no longer be relied upon, effective 18 months after the July 27, 2020 effective date of the final rule.

The New Regulation – 29 C.F.R. § 2520.104b-31

The final regulation is codified at 29 C.F.R. § 2520.104b-31 (the "New Rule"). The DOL's principal objective in issuing the New Rule is "to better leverage ongoing improvements in online and mobile-based technology and communications and to provide a structure that will be appealing to, and workable for, today's workers." *See* Preamble, 85 Fed. Reg. 31884, 31886 (May 27, 2020). The DOL indicates its belief that a "notice-and-access framework" embodied by the New Rule will significantly reduce plan costs and estimates that more than $3 billion in net cost savings to retirement plans will be realized over the course of 10 years due to this expansion of electronic disclosures.

Under the New Rule, retirement plan administrators can satisfy their obligation to furnish retirement-based ERISA-required disclosures by furnishing to participants and beneficiaries an electronic notice and either making the information accessible online or providing it in an email. Retirement plan administrators may utilize the DOL's new alternative safe harbor electronic disclosure rule beginning July 27, 2020.

A. To Which Individuals May Electronic Notice Be Provided?

A "Covered Individual" is a person to whom electronic disclosure may be made under the New Rule, which defines a "Covered Individual" as a participant, beneficiary, or other individual entitled to Covered Documents (discussed below) and who provides the employer, plan sponsor, or administrator with an electronic address, such as an email address or internet-connected mobile-computing-device (e.g., smartphone) number. The provision of the electronic address may be done as a

condition of employment, at commencement of plan participation, or otherwise. Additionally (and quite helpfully), if an electronic address is assigned by an employer to an employee for the purpose of receiving electronic communications, the employee is treated as if he or she provided such electronic address. So, for example, if an employer assigns an email address to an employee for the purpose of receiving emails, the plan administrator may treat the employee as if he or she provided the electronic address. This is a significant improvement and enhancement over the 2002 Safe Harbor.

Plan administrators must keep in mind that, if electronic notice is being provided to an employee at his or her employer-provided electronic address, when the employee terminates employment additional steps must be taken to ensure the New Rule's safe harbor is still satisfied for that now-former employee. Specifically, the retirement plan administrator must take measures reasonably calculated to either ensure the continued availability of the covered individual's previously-provided personal electronic address (if any) or obtain a new electronic address that enables the now-former employee to continue to receive Covered Documents after termination of employment. Plan sponsors should build this step into their employment separation processes for employees who participate in their retirement plans to avoid inadvertently falling outside the New Rule safe harbor and failing to provide ERISA-required disclosures.

B. What Documents May Be Provided Electronically?

Only "Covered Documents" are permitted to be disclosed electronically under the New Rule, but a Covered Document is broadly defined to include any document that the retirement plan administrator is required to furnish to participants and beneficiaries pursuant to Title I of ERISA, but does not include any document or information that must be furnished only upon request. A Covered Document, therefore,

includes (among other things) summary plan descriptions (SPD), summaries of material modifications (SMM), and summary annual reports (SAR). If a participant or beneficiary requests a copy of a specific document, the plan's delivery of the requested document cannot be done through electronic delivery by default in reliance on the New Rule. The requesting party may, of course, consent to the delivery of the requested document via electronic means, and if he or she consents, then electronic delivery of the requested document is acceptable.

C. Can a Person Opt Out of Receiving Documents Electronically?

Yes. This provision of the 2002 Safe Harbor continues to remain in place even under the New Rule. Covered Individuals must have the right, free of charge, to globally opt out of electronic delivery and receive only paper versions of Covered Documents. Only one paper copy of any Covered Document must be provided free of charge to a Covered Individual. Further, the retirement plan administrator must establish reasonable procedures for keeping track of, and honoring, an individual's opt-out request. Procedures must not unduly hamper or inhibit submitting or processing an opt-out request.

D. What Must a Plan Administrator Do to Comply with the New Rule?

a. ***STEP #1: Select which option – website or email – the administrator will use for electronic delivery.***

A plan administrator must determine whether it will maintain a continuously accessible website on which it will post the disclosures or whether it will provide the disclosures via email. There are similar, but slightly different requirements for each manner of compliance. These are discussed in more detail below.

b. ***STEP #2: Provide an initial notice of default electronic delivery and right to opt out.***

Before a retirement plan administrator can rely upon the New Rule to furnish electronic notice, the retirement plan administrator must first provide a *paper* notification that Covered Documents will be furnished electronically to an electronic address in the future. This initial notice must include the following:

- Identification of the electronic address that will be used for the Covered Individual;

- Any instructions necessary to access the Covered Documents (e.g., website address and log-in instructions);

- Statement of the right to request a paper version of a Covered Document, free of charge, and an explanation of how to exercise this right;

- Statement of the right to opt out of electronic delivery altogether and an explanation of how to exercise this right; and

- If the website delivery method is selected (discussed below), a cautionary statement that the Covered Document is not required to be available on the website for more than one year or, if later, until it is superseded by a subsequent version.

c. ***STEP #3: Deliver the Covered Documents via the selected electronic delivery method.***

i. <u>Option 1: Make Covered Documents available on a website.</u>

1. *Website Requirements.*

Retirement plan administrators who select the website route must maintain an

internet website where a Covered Individual is able to access Covered Documents. Covered Documents on the website must:

- Be available and posted on the website no later than the date on which the Covered Document must otherwise be furnished under ERISA;

- Remain available on the website for at least one year or, if later, until they are superseded by an updated version;

- Be presented on the website in a manner calculated to be understood by the average plan participant;

- Be in a widely-available format or formats that are suitable to be both being read online and being printed clearly on paper (for example, PDF format); and

- Be text-searchable.

Plan administrators must also take measures to reasonably ensure that the website being used protects the confidentiality of personal information relating to any Covered Individual.

Should a plan administrator experience “technical difficulties” with the website, making Covered Documents are temporarily unavailable for a period of time due to unforeseeable events or circumstances beyond the control of the administrator, the New Rule provides some relief. Despite the technical difficulties, the plan administrator will be deemed to be compliant with the New Rule if the plan administrator:

- Has reasonable procedures in place to ensure the Covered Documents are available; and

- Takes prompt action to ensure the Covered Documents are electronically available as soon as practicable after becoming aware of the technology issue or disruption.

Plan administrators should have reasonable security measures in place to protect their websites and notification systems to alert them of any website availability issues.

2. Provide a notice of internet availability for Covered Documents and/or an annual combined notice of availability.

In general, Covered Individuals must be provided a notice of internet availability ("Notice") whenever each Covered Document is made available on the website. The Notice must be sent to the electronic address of each Covered Individual (unless he or she has opted out). The Notice must include all of the following:

- A prominent statement that reads "Disclosure About Your Retirement Plan" (for example as a title, legend, or subject line).

- A statement that: "Important information about your retirement plan is available at the website address below. Please review this information."

- An identification of the Covered Document by name and a brief description of the document if identification by name only would not

reasonably convey the nature of the Covered Document.

- The internet website address where the Covered Document is available. The website address must be sufficiently specific to provide “ready access” to the Covered Document. In other words, it is not permissible to provide a general website address and make the participant hunt for the Covered Document on that website. The website address provided in the Notice must take the Covered Individual directly to the Covered Document (a log-in is permitted to be required, but after logging in the individual must be taken directly to the Covered Document).

- A statement of the right to obtain a paper version of the Covered Document, at no cost, and an explanation of how to exercise this right.

- A statement of the right to opt out of receiving Covered Documents electronically, and an explanation of how to exercise this right.

- A cautionary statement that the Covered Document is not required to be available on the website for more than a year or, if later, after it is superseded by a subsequent version of the Covered Document.

- A telephone number to contact the administrator or other designated representative of the plan.

Further, the Notice must be written in a manner calculated to be understood by the average plan participant and may not be

combined with other content or information except as described in the next paragraph.

To prevent “email overload” from Notices being provided each time a retirement plan disclosure is posted, the New Rule allows a plan administrator to combine Notices in certain circumstances. Specifically, the New Rule permits the administrator to provide a single “combined” notice of internet availability for one or more of the following documents:

- Summary plan description.

- Any document or information that must be furnished annually rather than upon the occurrence of a particular event and does not require action by a Covered Individual by a particular deadline (for example, a summary annual report or an annual funding notice).

- Any other document authorized in writing by the Secretary of Labor, by regulation or otherwise, in compliance with ERISA § 110.

- Any applicable notice required by the Internal Revenue Code if authorized in writing by the Secretary of the Treasury.

The combined annual notice must be provided no more than 14 months after than previous combined annual notice. The DOL indicated that it did not want plan administrators to have to push back the date of furnishing from year to year to avoid the risk of running afoul of a strict 12-month requirement.

Quarterly statements cannot be provided via a single combined annual notice, and must be provided via a quarterly Notice.

ii. Option 2: Provide Covered Documents via email.

A retirement plan administrator may opt to deliver Covered Documents via email instead of maintaining a continuously accessible website. The email with the Covered Document must be sent no later than the date on which the Covered Document must be furnished and must include all of the following:

- The Covered Document as an attachment or in the body of the email (if an attachment, also include an identification or brief description of the document).

- A subject lines that reads “Disclosure About Your Retirement Plan.”

- A statement of the right to obtain a paper version of the Covered Document, at no cost, and an explanation of how to exercise this right.

- A statement of the right to opt out of receiving Covered Documents electronically, and an explanation of how to exercise this right.

- A telephone number to contact the administrator or other designated representative of the plan.

The Covered Document provided via email must:

- Be written in a manner reasonably calculated to be understood by the average plan participant;

- Presented in a widely-available format that is suitable to be read online, printed

on paper, and permanently retained in an electronic format; and

- Be text-searchable.

The New Rule does not provide for a combined email notice in the same manner as the combined annual notice of availability for Covered Documents that are posted on a website. In the Preamble to the New Rule, the DOL explains that plan administrators may attach more than one Covered Document to a single email if those same documents could be mailed together in a single envelope if delivered in hard copy format. According to the DOL, there are instances in which documents must be furnished separately, such as when the required timing for different documents does not align or the content of a particular document may not be combined with other documents.

d. ***STEP #4: Follow up on any undeliverable notices.***

Under either method of delivery, the system for furnishing any Notices or Covered Documents to electronic addresses must be designed to alert the retirement plan administrator if an electronic address is invalid. Upon receiving such an alert, the administrator must promptly take reasonable steps to cure the problem or treat the covered individual as though they have made an opt-out election (i.e., send a hard-copy notice). The purpose of this requirement is to ensure Covered Individuals actually receive the disclosures and information to which they are entitled under ERISA.

Conclusion

The New Rule permits retirement plan administrators to move to a default electronic method of delivery for ERISA-required notices for a

broader range of participants, beneficiaries, and other individuals. However, there are a number of administrative requirements that must be satisfied and monitored to comply with this new safe harbor. Plan administrators will need to put procedures in place to administer and comply with opt-out requests, collect electronic addresses upon employment terminations, and follow-up on undeliverable notices. They will also need to carefully comply with the specific requirements associated with their selected method of electronic delivery.

Please contact your Akerman attorney for assistance or more information.

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