DoL releases “interim guidance” on electronic delivery of disclosures

By Editor Test *Wed, Sep 21, 2011*

For retirement plans that must disclose general plan and investment information to participants starting May 31, 2012, the Department of Labor offered two viable approaches regarding information delivery.

The Department of Labor issued the following release offering guidance on electronic disclosure of plan and investment information to retirement plan participants:

A year after publishing disclosure requirements for participant-directed retirement plans, the U.S. Department of Labor (DOL) has issued interim guidance regarding electronic delivery of the disclosures.

The participant-directed plan disclosure rule establishes new requirements for the disclosure of general plan-related information, and investment-related information, to plan participants and beneficiaries who are permitted to direct investments for their retirement plan accounts.

The rule applies to plan years beginning on or after November 1, 2011, although the earliest date on which disclosures will have to be made under a transition rule is May 31, 2012 (which is the applicable date for calendar-year plans).

Two approaches

In view of the upcoming applicability date of the new disclosure rule, DOL recognized that some form of interim relief would be necessary since it is unlikely to provide final regulatory guidance until after the applicability date. The interim relief, contained in Technical Release 2011-03 (released on September 13, 2011, in conjunction with a webinar on the disclosure rule), provides two approaches.

The first approach is available for disclosures that are included in a pension benefit statement, which can only be the case for “plan-related” information (“investment-related” information cannot be provided as part of a benefit statement). These may be furnished in the same manner that the other information in the same pension benefit statement is furnished. This permits the use of a secure continuous access website, in accordance with DOL’s prior good-faith compliance standard for the provision of benefit statements. No affirmative approval is required.

The second approach is available for disclosures that are not included in a pension benefit statement. There are two options. The first is to use DOL’s existing safe harbor rule, which, as described above, requires affirmative consent from participants who do not have workplace computer access. The second is an interim procedure using a modified affirmative consent approach, which is available pending further guidance.

The interim procedure requires the following:

1. The participant is provided with an “initial notice” that describes the voluntary nature of providing an

email address for electronic delivery purposes (see next paragraph), the consequence of disclosure being made electronically, the information that will be furnished electronically and how it can be accessed, the availability of a paper copy, the ability to opt out of electronic delivery at any time, and the procedure for updating the email address.

2. In response to the “initial notice” described above, the participant voluntarily provides an email address for purposes of receiving these disclosures.

- DOL emphasized that “voluntary” means “voluntary.” For example, the email address cannot be required as a condition of employment, nor can the employer’s assignment to the participant of an email address be considered “voluntary” for this purpose. However, if the participant is required to provide an email address to obtain secure continuous website access to pension benefit statements, that would be considered sufficiently voluntary for this purpose.
- DOL has provided a limited exception to the “voluntary” requirement through a “special transition provision,” available at the time the first initial disclosures are required under the participant disclosure rule. Under this provision, if the employer, plan sponsor, or administrator has an email address on file for a participant (subject to certain limitations), it can treat the initial notice and voluntary requirements as satisfied if an initial notice, containing most of the information described in section 1 above, is furnished to the participant in paper form (or by email if there is evidence of electronic interaction between the plan and the participant within the last 12 months (DOL gave examples of what would meet this requirement)), no earlier than 90 days or later than 30 days prior to the date of the first initial disclosures required under the new disclosure rule (e.g.,May 31, 2012 for calendar-year plans).

3. The participant is provided with an “annual notice” containing most of the same information as the initial notice, including the ability to opt out. The annual notice must be furnished in paper form unless there is evidence that the participant has interacted electronically with the plan since the last annual (or initial) notice was provided.

4. The plan administrator takes “appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system results in actual receipt of transmitted information.” For example, the plan administrator could use a “return receipt” or “notice of undelivered electronic mail” feature or conduct periodic reviews or surveys to confirm receipt.

5. The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the electronic system protects the confidentiality of personal information.

6. Notices are written in a manner calculated to be understood by the average participant.

DOL cautioned that this guidance has the effect of a “no enforcement” policy, and does not necessarily affect the rights or obligations of other parties. This appears to mean that there is no assurance these standards would apply in the event of a participant lawsuit claiming a failure to provide the required disclosures.

Striking a balance

The DOL guidance attempts to strike a balance between the opposing concerns raised by the comments. The plan sponsor community generally asked for a “negative consent” approach, whereby a plan administrator could deliver disclosures electronically unless the participant opts out; the other side asked for stronger affirmative consent requirements before permitting electronic delivery.

The interim approach does not go as far as a negative consent approach, still requiring some form of affirmative consent, but provides limited special rules that describe circumstances where affirmative consent can be inferred. The issue for plan sponsors and administrators is to determine the extent to which these limited special rules are available to their plan participant populations.

There will likely be further discussion of electronic delivery issues as DOL progresses toward its goal of modifying its existing safe harbor rule. The experience of plans using the approaches described in the current guidance is likely to influence the direction of those further changes.