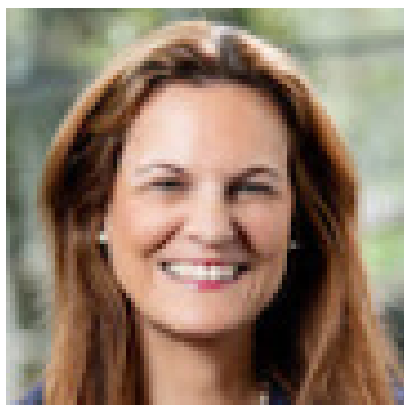

New safe harbor for electronic retirement plan disclosures

By Wagner Law Group *Thu, Oct 24, 2019*

Retirement plan sponsors can now satisfy disclosure requirements by making the information available on a website, Wagner Law Firm experts explain. Photo: Marcia Wagner.



In 2002, the DOL issued a safe harbor for electronic disclosure that is available only to those participants that have electronic media at work, and those individuals who affirmatively opt in to electronic documentation.

There have been calls from many quarters for the DOL to update those regulations to reflect the advances in technology since the 2002 regulations, including an August 2018 Executive Order calling upon the DOL, in consultation with Treasury, to explore “the potential for broader use of electronic delivery as a way to improve the effectiveness of disclosures and to reduce their associated costs and burdens.”

In response, on October 22, 2019, the DOL issued proposed regulations establishing a new safe harbor that would allow retirement plan sponsors to satisfy disclosure requirements by notifying participants and beneficiaries that the information will be made available on a website.

The proposed regulations only apply to pension plan disclosures, rather than welfare plan disclosures, such as group health plans and disability plans, although the proposed regulations have reserved consideration of applying these rules to welfare benefit plans.

When final regulations are issued, they will be effective 60 days after the notice is published in the Federal Register, but because this new safe harbor is voluntary and optional, the applicability date, which frequently is after the effective date, will be the first day of the first calendar year following publication of the final rule.

The proposed regulation applies to participants and beneficiaries who are entitled to covered documents and who, as a condition of employment, either at the beginning of plan participation or otherwise, provide the plan sponsor, employer, or plan administrator, with an email address.

However, this requirement is satisfied if an employer assigns an electronic address to an employee. At the time that a covered individual severs from employment with the employer, the administrator must take reasonable measures to ensure the continued accuracy of the electronic address the employer has been provided, or alternatively to obtain a new electronic address.

A covered document is any document that the administrator is required to furnish to participants and beneficiaries under Title I of ERISA, except for documents that must be furnished upon request.

Prior to reliance upon these proposed regulations, a plan administrator must furnish to each individual:

- A paper notification that some or all covered documents will be provided electronically
- A statement of the right to request and obtain a paper version of the requested document, free of charge
- The right to opt out of receiving documents electronically, and an explanation of how to exercise these rights.

A notice of Internet availability must generally be furnished at the time the covered document is made available on the website. However, if the administrator furnishes a combined notice of internet availability for certain specified documents, then the combined notice must be furnished each plan year, and, if the combined notice was furnished in a prior plan year, the notice must be provided no more than 14 months following the date that the prior plan year's notice was furnished.

The proposed regulations also dictate the content of the disclosure, including a prominent statement such as "Disclosure about Your Retirement Plan" and a statement that "Important Information about your retirement plan is available at the website address below. Please review this information," as well as:

- A brief description of the covered document
- The Internet website address where the information is available
- A statement of the right to request and obtain a paper version
- A statement of the right to opt out of receiving electronic documents
- A telephone number to contact the administrator or other designated plan representative

The notice can only contain the content described in the proposed regulations, other than design elements; and must be written in a manner calculated to be understood by the

average plan participant.

The administrator is also required to ensure that the covered document is available on the website no later than the date on which the covered document:

- Must be furnished under ERISA
- Must remain available on the website until it is superseded by a subsequent version of the covered document
- Must be presented in a manner calculated to be understood by the average plan participant
- Must be presented in a format that is suitable to be both read online and printed clearly on paper, and the document can be searched electronically by numbers, letters, or words.

The administrator must also take measures reasonably calculated to protect the confidentiality of a covered individual's personal information.

Additionally, upon request from a covered individual, the administrator must promptly furnish to each individual free of charge, a paper copy of a covered document, and the covered individual must have the right to opt out of electronic delivery and receive paper versions of some or all covered documents.

The system for furnishing notice of Internet availability must be designed to notify the administrator of a covered individual's invalid or inoperable electronic address. If the administrator's reasonable attempts to correct the problem, such as sending the notice to a secondary email address, do not work, the administrator must treat the covered individual as if he or she had elected to opt out of electronic document delivery.

Finally, [if] covered documents are temporarily unavailable on a website due to unforeseeable events or events beyond the control of the plan administrator, the conditions of the proposed regulations will continue to be treated as satisfied, provided that the administrator has reasonable procedures in place to ensure that covered documents are available in the manner required by the regulations, and the administrator takes prompt action to ensure that the documents become available as soon as practicable.