



Delivering DOL Disclosures May Get Easier

The Department of Labor (DOL) has issued [proposed regulations](#) that provide an additional safe harbor for providing electronic retirement plan disclosures to participants and beneficiaries. The regulations also incorporate the framework used in existing guidance found in [FAB 2006-03](#).

For several years, the retirement industry has been requesting additional guidance and simplified procedures for providing disclosures electronically. Although the current rules were supposed to make it easier for employers and participants to communicate electronically, many employers still find it difficult to meet the current electronic notification requirements. The DOL hopes to remedy this with the release of the proposed regulations.

Note that the proposed regulations apply only to pension benefit plans providing disclosures required under Title I of ERISA; they *do not* apply to IRS disclosures or to health and welfare plan disclosures.

What are the current safe harbor rules?

In 2002, the DOL created [safe harbor](#) standards for electronically delivering any plan disclosures required by the Employee Retirement Income Security Act of 1974 (ERISA). Although this is not the only permissible way that an employer may use electronic media, the safe harbor treats the notice or other document sent by email or other electronic means as having been properly delivered.

The DOL later issued limited guidance for participant benefit statements (FAB 2006-03), qualified default investment alternatives ([FAB 2008-03](#)), and participant fee disclosures ([Technical Release 2011-03R](#)), but has not updated its broader e-delivery safe harbor since 2002.

The 2002 safe harbor applies to two categories of recipients.

- The first category consists of participants who can effectively access documents provided electronically at their job site and who regularly access the employer's electronic information system as part of their job duties.
- The second category consists of participants, beneficiaries, and others (e.g., retirees) who do not fit into the first category but are entitled to ERISA documents.

The safe harbor assumes that individuals in the second category are using electronic information systems that are beyond the control of the plan sponsor. Accordingly, those individuals must affirmatively consent to receive documents electronically.

What's different under the proposed safe harbor rules?

The proposed regulations add a second electronic notification safe harbor to the existing 2002 regulations. Similar to FAB 2006-03, the proposed safe harbor allows employers to post retirement plan disclosures online. Employers that want to use a safe harbor e-delivery method can use both options or choose between the new online option and the e-delivery options provided under the 2002 guidance.

The proposed regulations also allow employers to treat e-delivery as their default delivery method for participants who have provided or been issued an electronic address (e.g., an email address or phone number on a smart phone). Participants who want to receive free paper documents must be allowed to opt out of the e-delivery method for some or all of the covered documents. Those who opt out must receive paper documents until they opt in to receive the covered documents online again. Employers must have reasonable procedures in place to track opt outs and requests for paper copies.

Employers may post more documents online

Unlike FAB 2006-03, which allows employers to post only pension benefit statements online, the proposed regulations allow employers to post all “covered documents” online. The DOL defines a covered document as any ERISA Title I document that an employer must provide to participants and beneficiaries. A covered document *does not* include a document provided only upon the participant’s written request (e.g., a request for a trust agreement).

Examples of covered documents that employers may post online include

- a summary plan description,
- a summary of material modifications,
- a summary annual report, or
- an annual funding notice.

Employers must provide an initial paper notification

Employers must provide a paper notice to each individual being defaulted to the e-delivery option. The notice must specify that some or all of the documents will be provided online. The notice must also

- explain that the participant can request a free paper copy of some or all of the documents,
- clarify that the participant can opt out of receiving documents online at any time, and
- describe how the participant can exercise those rights.

Employers must notify participants when documents are posted

When an employer posts a covered document online, the employer must also notify participants that the document is available. The notice, referred to as a “Notice of Internet Availability,” must meet certain form and content requirements. The employer’s system for delivering this notice must alert the employer when there is an inoperable or an invalid electronic address.

The employer generally must provide the Notice of Internet Availability for *each* covered document, as each document is posted. But the employer can provide one combined notice for certain covered documents that are triggered solely by the passage of time. For example, an employer can provide one combined notice if it posts the summary plan description and summary annual report at the same time.

Employers providing a combined notice for multiple covered documents may provide the notice annually, but over a 14-month window for added flexibility.

Websites must meet certain standards

Employers must ensure that employees can easily access any covered documents posted online. For example, an employer could provide a web address that leads directly to the covered document or to a login page that contains a prominent link to the covered document. Employers must also

- post documents online by their applicable due date;
- keep documents online until the documents are superseded;
- present documents in a printable, easy-to-read format that can be searched electronically by numbers, letters, or words;
- permanently retain each document in an electronic format; and
- protect each individual's personal information.

A new rule applies to former employees

If an employee terminates employment (e.g., retires), the employer must take reasonable steps to obtain and maintain an accurate email address for the former employee. This rule is meant to give former employees who are still participating in the plan access to important plan information, while still allowing the employer to post the disclosures electronically.

More to come?

The DOL has asked for comments on the proposed regulations and has also issued a Request for Information (RFI). The questions in the RFI generally focus on how the DOL can improve the design and content of ERISA disclosures. Examples of questions asked include the following.

- What current routine disclosures need improved effectiveness and efficiency?
- Is any required disclosure obsolete?
- Is it feasible to condense and streamline information into fewer or less voluminous disclosures?
- Are there steps the DOL could take to better coordinate disclosures required under ERISA and notices required under the Internal Revenue Code?

Comments on both the proposed regulations and responses to the RFI are due by November 22, 2019. The new guidance is proposed to take effect 60 days after publication as final regulations in the *Federal Register*. Once published, the regulations will become applicable on the first day of the next calendar year.

Next Steps

The proposed regulations seem to represent a "middle-of-the-road" approach by the DOL. While many in the retirement industry have been hoping for this type of guidance, others believe that it will make it harder for certain participants (e.g., retirees) to access important plan information. In addition, the proposed regulations apply only to DOL retirement plan notices, which means employers must still follow separate IRS disclosure requirements when delivering IRS required notices.

Employers interested in using the proposed safe harbor may want to start reviewing the regulations now (knowing that some provisions might change) in order to determine whether to make operational changes,

which could include website modifications and revisions to notifications. Those looking for additional information on the proposed regulations may refer to the DOL's [fact sheet](#) and [news release](#). Ascensus will continue to monitor any new developments on the proposed regulations. Visit ascensus.com for the latest information.