

Employee Benefits Briefing

Department of Labor Interim Guidance on Electronic Disclosure of Fee Information

Background

In 2012, plan fiduciaries must provide 401(k) (and other defined contribution) plan participants more detailed information regarding plan investments and the fees that affect their accounts. For calendar year plans, the basic fee and investment related information (“Investment Information”) needs to be distributed by May 31, 2012, and additional plan-related information (“Plan Information”) by August 14, 2012.

Plan sponsors and service providers asked the U.S. Department of Labor (“DOL”) to permit this information to be distributed electronically. The DOL received extensive comments on this issue, which it continues to review. In the meantime, the DOL has issued interim advice on how this can be accomplished pending the issuance of further guidance.

In Technical Release 2011-03 (September 13, 2011), the DOL allowed electronic disclosure with regard to Investment Information and Plan Information to the extent described below.

Discussion

A. What is Included in Investment Information and Plan Information?

The following are the respective features of this information:

Investment Information

- name of each designed investment alternative (not including “brokerage windows” or similar accounts)
- investment category (e.g., stocks, bonds, employer securities, etc.)
- performance data for one, five and ten (or shorter life) years, and fixed-return information
- benchmarks for the investment where returns are not fixed

Plan Information

- circumstances under which participants and beneficiaries may direct investments
- limitations applicable to any investment instructions (e.g., transfer restrictions)
- circumstances relating to voting, tender and similar instructions as well as restrictions applicable to them
- identification of plan investment alternatives and investment managers

Investment Information

- fee and expense information and related statements
- Internet website address for the investment alternatives
- materials received by the plan relating to available voting, tender and similar rights
- information available upon request (e.g., prospectuses, financial statements, share value, portfolio list)

Plan Information

- description of any “brokerage windows” or “self-directed brokerage accounts” or similar arrangements
- general plan administrative expenses (e.g., legal, accounting, recordkeeping) not directly reflected in the investment alternatives themselves and their allocation to individual accounts
- individual expenses (e.g., loans, QDROs, brokerage window commissions, etc.) not reflected in the investment alternatives themselves

B. Existing Electronic Disclosure Rules

The DOL electronic delivery regulation (Reg. 2520.104b-1(c)) (“Electronic Delivery Regulation”) permits disclosure electronically of ERISA-related information in two circumstances:

1. *Workplace e-mail delivery*: The participant has regular access to the employer’s electronic information system as part of his or her job duties (generally applicable to office employees and other employees with regular access to company email).
2. *Written Consent*: The participant has in writing consented to such disclosure (generally applicable to former employees, beneficiaries, alternate payees and employees who do not have regular access to company e-mail).

The Electronic Delivery Regulation requires the method of delivery to use “measures reasonably calculated to ensure actual receipt of the material,” which can be demonstrated by using such methods as return-receipt or notice of undeliverable electronic mail features, or conducting periodic reviews or surveys to confirm receipt of the transmitted information.

The DOL expanded on the Electronic Delivery Regulation in Field Assistance Bulletin 2006-03, which permits distribution of benefit statements electronically if the statements are made available through a secure website and participants are notified annually about how to access their statements and about their opportunity to request paper copies of those statements.

In its latest release, the DOL stated that both Investment Information and Plan Information may be delivered using the procedures under the Electronic Delivery Regulation, but that *only Plan Information* may be delivered using the secure website approach under Field Assistance Bulletin 2006-03.

C. Special Alternative for the Disclosure of “Investment Information”

Technical Release 2011-03 includes a method for electronic delivery of Investment Information that is an alternative to the procedures under the Electronic Delivery Regulation. In order to use this alternative, the following conditions must be satisfied:

- *Initial Notice.* An initial notice is given to participants and beneficiaries explaining the voluntary electronic disclosure process (e.g., the types of information, how to access it, get paper copies, opt-out, etc.).
- *Voluntary Provision of E-mail Address.* In response to the Initial Notice, the participant or beneficiary voluntarily provides an e-mail address.
- *Annual Notice.* The information in the Initial Notice is distributed annually in paper form until the plan has evidence the participant has interacted electronically with regard to the information (e.g., the participant’s updating, resubmitting or confirming his or her e-mail address with the plan).
- *Delivery.* Reasonable steps (e.g., undelivered electronic mail features, etc.) are taken to assure that the information is actually delivered.
- *Confidentiality.* Reasonable and adequate steps are taken to maintain confidentiality.
- *Calculated to Be Understood.* The information must be in a form that is calculated to be understandable to the average plan participant.

A special-transition rule permits a plan sponsor to satisfy the “Initial Notice” and “Voluntary Provision of E-Mail Address” requirements for e-mail addresses on file with the employer on the 2012 disclosure date (i.e., May 31, 2012) if a special “Transition Group Initial Notice” is furnished to such individuals either (i) by paper or (ii) electronically. If furnished electronically, the employer must have evidence that the individual had an “electronic interaction” (e.g., sent an e-mail message to the plan, made an electronic investment change, etc.) with the plan in the 12 months preceding the Transition Group Initial Notice.

Conclusion

This guidance is less than what many plan sponsors and service providers had requested (such as expanded secure website disclosure or a participant opt-out approach) and may be of limited assistance. The DOL continues to review this matter, and we hope it will expand the means of providing electronic information.

If you have any questions regarding the electronic fee disclosure regulation, please contact **John J. Jacobsen** (312-609-7680), **Philip L. Mowery** (312-609-7642) or **Paul F. Russell** (312-609-7740).

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