

## **DOL Issues Electronic Guidelines for New 2012 Participant Investment and Fee Disclosures**

February 15, 2012

The U.S. Department of Labor recently issued guidelines for the electronic distribution of mandatory investment and fee disclosures for participants in self-directed account plans subject to ERISA. This guidance may help plan administrators implement the new rules for the disclosure of quarterly and annual plan-related information, but still contains affirmative participant approval requirements for the electronic distribution of all initial disclosure notices and mandated investment-related information to participants.

Prior to August 2012, plan sponsors and administrators of calendar-year plans should familiarize themselves with the new guidelines to determine what mandatory disclosures will be made in electronic format (if any), and whether their plans have sufficient systems and administrative capabilities to provide the mandatory disclosures in an electronic format.

The U.S. Department of Labor (DOL) recently issued new guidelines applicable to the electronic distribution of new mandatory investment and fee disclosures for participants in self-directed account plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). This electronic guidance may help plan administrators implement the new DOL rules for disclosure of quarterly and annual plan-related information, but still contains affirmative participant approval requirements for electronic distribution of all initial disclosure notices and mandated investment-related information to participants.

### **Background on the New Disclosure Requirements for Investment and Fee Information**

In 2011 the DOL issued final rules mandating the disclosure of specific investment and fee information to participants in self-directed account plans subject to ERISA. These final rules require that certain disclosures, including detailed plan-related information and investment-related information, be included in an initial notice, which will also be updated and re-issued on an annual basis. Other disclosures, including a summary of the administrative and individual expenses charged against participant accounts, may be included in the quarterly account statements issued to participants. Under the

transition rules applicable to calendar year plans, the initial disclosure notice is due to participants by August 30, 2012. Quarterly disclosure of the requisite plan-related information is required by November 14, 2012. For more information on the new DOL disclosure rules, see [Department of Labor Issues New Rules on 401\(k\) Fee Disclosure to Participants](#). See the [new DOL guidance on final regulations under ERISA section 408\(b\)\(2\)](#) for a summary of the revised effective dates.

The DOL is currently working on new general guidelines for the electronic delivery of required participant communications. In the meantime, the DOL has issued Technical Release 2011-03R to provide temporary guidance on the permissible electronic distribution methods for required initial, quarterly, and annual disclosures.

### **Background on Existing Rules for Electronic Participant Communications**

*Safe Harbor for Electronic Communications*—Current DOL regulations provide safe harbor rules for the electronic distribution of mandatory participant communications. Under these safe harbor rules, a plan administrator can distribute participant notices electronically if the participant has regular access to the employer's electronic information system as part of his or her job duties, or has provided affirmative written consent to electronic distribution. Many plan administrators view this safe harbor as cumbersome because it requires affirmative participant approval from participants who do not have computer access at their workstations.

*Modified Safe Harbor for Quarterly Account Statements*—Field Assistance Bulletin 2006-3 (FAB 2006-3) sets forth more generous rules for the electronic distribution of quarterly account statements. FAB 2006-3 allows quarterly account statements to be provided through a secure website if the plan administrator provides an annual notice of electronic availability and notifies participants of their right to request a paper copy of their quarterly account statements free of charge. No affirmative approval by the participant is required, even if the participant does not have computer access at his or her workstation.

### **Electronic Distribution of Quarterly Notices Under New Technical Release**

Under the new Technical Release, a plan administrator may provide quarterly account statements electronically, while opting to provide paper copies of all new mandatory

disclosure requirements of plan- and investment-related information. Alternatively, Technical Release 2011-03R confirms that plan administrators may continue to rely on FAB 2006-3 to distribute quarterly account statements, even after the statements have been updated to include the new quarterly plan-related disclosures. Because the electronic distribution of quarterly account statements is not required, a plan administrator also may provide participants with hard copies of these statements.

### **Electronic Distribution of Initial and Annual Plan-Related Information Notices Under New Technical Release**

In addition to quarterly disclosure notices, Technical Release 2011-03R provides guidance on the electronic distribution of the initial and annual disclosures of plan-related information. Although quarterly account statements could satisfy the annual disclosure requirements for plan-related information if properly modified, a quarterly account statement normally would not be generated within the required time periods for the initial disclosure notice. Thus, electronic provision of the initial disclosure notice *cannot* be made in accordance with FAB 2006-03. Instead, to distribute initial disclosures of plan-related information electronically, a plan administrator must comply with the specialized electronic distribution rules set forth in Technical Release 2011-03R. These rules are explained in more detail in the following section.

With regard to annual disclosures of plan-related information, a plan administrator must determine whether to modify quarterly account statements to include these annual disclosures or to use an alternate electronic or hard-copy distribution process. If a plan administrator chooses the former, then he or she may continue to distribute these statements in accordance with FAB 2006-03.

### **Electronic Distribution of Investment-Related Information and All Notices Under New Technical Release**

For electronic distribution of the initial and annual disclosures of investment-related information, Technical Release 2011-03R provides two different electronic options. These two options also are available for electronic distribution of *any* of the new mandated quarterly, initial or annual disclosures, including the initial disclosure of plan-related information.

Under option one, the plan administrator may make electronic disclosure of the new mandated notices using the existing DOL safe harbor for electronic communications described above. Under option two, the plan administrator may make the mandatory disclosures through a secure, continuous access website only if the notice complies with *each* of the following requirements:

1. Participants must voluntarily provide an e-mail address to receive the mandatory plan- and investment-related disclosures. The e-mail address must be provided in response to an initial electronic distribution notice (see *requirement 2*).
2. An initial electronic distribution notice must accompany the request for the participant's e-mail address. It must include the following information:
  - i. A statement that providing an e-mail address for the receipt of mandatory disclosures is voluntary and, as a result of providing the e-mail address, the required mandatory disclosures will be made electronically
  - ii. Identification of the mandatory disclosures that will be furnished electronically and how the disclosures can be accessed by participants
  - iii. A statement that the participant has the right to request and obtain, free of charge, a paper copy of the mandatory disclosure information and an explanation of how to exercise that right
  - iv. A statement that the participant has the right, at any time, to opt out of receiving mandatory disclosures electronically and an explanation of how to exercise that right
  - v. An explanation of the procedure for updating the participant's e-mail address
3. The plan administrator must provide an annual electronic distribution notice including the information specified in items 2.ii through 2.v. This notice may be sent via e-mail if there is evidence the participant has "interacted electronically" with the plan during the past 12 months. If not, the plan

administrator must provide a paper copy of the annual electronic distribution notice.

4. The plan administrator must ensure the electronic delivery system results in actual receipt of the transmitted information, e.g., through a “return receipt” feature.
5. The plan administrator must ensure the electronic delivery system protects the confidentiality of personal information.
6. All notices are written in a manner that will be understood by the average plan participant.

Technical Release 2011-03R also provides special transition rules that apply in the event the plan administrator already has a participant’s e-mail address on file. These transition rules are available only if there is evidence the e-mail address was used by the participant for “plan purposes” within the past 12 months.

## Next Steps

Technical Release 2011-03R is intended as temporary guidance until the DOL completes its review of its existing electronic distribution rules. In the meantime, prior to August 2012, plan sponsors and administrators of calendar-year plans should familiarize themselves with Technical Release 2011-03R to determine what mandatory disclosures will be made in electronic format (if any), and whether their plans have sufficient systems and administrative capabilities to provide the mandatory disclosures in an electronic format.

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