



Deadline Approaches For Retirement Plan Disclosures

EMPLOYERS MUST NOTIFY PARTICIPANTS ABOUT FEES, INVESTMENT INFORMATION

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The deadline is fast approaching for plan administrators to comply with U.S. Department of Labor (DOL) final regulations regarding new disclosures to plan participants. The regulations, known as the “Participant Disclosure Regulations,” govern retirement plans with participant-directed investments, such as most 401(k) and 403(b) plans.

The initial deadline — the later of May 31, 2012 or 60 days after the first day of the first plan year beginning on or after Nov. 1, 2011 — requires disclosure of detailed plan and investment-related information to all eligible employees and plan participants, beneficiaries and alternate payees (“participants”). The date, which is 45 days after the plan year quarter in which the initial plan disclosures are due (Aug. 14, 2012 for calendar year plans), marks the regulatory deadline for the disclosure of specific administrative and individual fee and expense information.

Meeting these deadlines will require advance planning, especially if the plan administrator intends to deliver the disclosures electronically. Much of the work to produce and deliver the disclosures will likely fall upon the plan’s third-party administrator or record keeper. However, the responsibility for compliance remains with the plan administrator. This might be the employer, or a designated plan committee or individual.

The force of the regulations, codified at 29 CFR 2550.404a-5, is required disclosure of three different categories of plan- and investment-related information: (1) general plan identification and operational information; (2) information on plan-level and individual participant, account-related, administrative fees and expenses, and (3) investment-related information. The new fee and expense disclosures (category 2) must include the dollar amount of fees and expenses actually charged to a participant’s account (e.g., accounting fees, record-keeping fees, sales charges or front-, or back-end, load fees, and loan charges), with a description of each item.

Additional disclosures include payment of any plan administrative expenses through a revenue-sharing or similar arrangement. The investment-related information (category 3) must identify each designated plan investment option (e.g., mutual fund) and, for investment options with variable returns, must provide “total return” investment performance and benchmark data in tabular format for their one-, five- and 10-year, or shorter “since inception,” performance periods, updated annually. While much of the information reportable within the first two categories may be included within participant quarterly pension benefit statements or the summary plan description (SPD), the last category may require a new stand-alone document.

Following the initial deadlines, the plan-

related information and investment-related information must be provided at or before a participant’s first opportunity to direct investment in the plan, and annually thereafter. A description

of changes to any plan-related information must be furnished 30 to 90 days in advance of the effective date. The fee and expense information must be provided quarterly.

Electronic Delivery

The Labor Department recently provided guidance on how the new participant disclosures can be delivered electronically. Plan administrators are permitted to deliver the general plan and fee and expense information in the manner set forth in DOL Field Assistance Bulletin 2006-03 (concerning electronic delivery of quarterly pension benefit information). In that guidance, DOL authorized electronic delivery either: (1) in accordance with tax rules for electronic delivery of retirement plan notices (Treas. Reg. §1.401(a)-21), or (2) through a secure web site that provides continuous access to that information, with notice and opportunity to request a paper copy. Participant disclosures of investment-related information are not permitted to be delivered in this manner but may be delivered electronically in accordance with either the existing DOL safe harbor method



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(Reg. §2520.104b-1(c)), or by using a new interim method.

Generally, the safe harbor method allows for electronic delivery to participants who can effectively access documents electronically at their work location where computer use is integral to their job duties, and to other participants, beneficiaries, and alternate payees who consent to receive electronic notifications in accordance with prescribed notice and consent procedures. However, many plan administrators have found the safe harbor method burdensome and of limited use. They may find the interim method offers a more viable alternative to mailing paper versions of the required disclosures.

Generally, to comply with the interim electronic delivery method, participants must affirmatively elect to receive electronic dis-

closures and voluntarily provide an e-mail address for purposes of receiving the disclosure materials. Further, a plan administrator must provide participants with an initial and annual notice that (1) explains the content of the electronic disclosures; (2) requests the participant's election to receive the disclosure electronically, including a request for the participant's e-mail address to which the disclosures are to be directed; and (3) sets forth procedures by which the participant may opt-out, change the e-mail address or obtain a paper version of the disclosure materials. If the participant agrees, electronic disclosure can follow. This new interim guidance is limited to the participant fee disclosure and cannot be relied on for any other purpose. Plan administrators must take steps to ensure the electronic delivery system results in actual receipt and protects the confidentiality of per-

sonal information.

Under a special transition rule, plans may rely on a participant's prior consent to electronic delivery and provision of his or her e-mail address. To satisfy the transition rule, a notice similar to that described above must be provided to these participants 30 to 90 days before the required disclosures are actually delivered. This rule permits electronic delivery unless the participant opts-out. Evidence of the participant's use of the e-mail for plan-related purposes in the last 12 months may be required.

Employers and plan administrators should be working now with their plan record keepers to ensure complete and timely compliance with the Participant Disclosure Regulations and, if applicable, the DOL guidance concerning electronic delivery of the participant disclosures. ■