

# DOL PROPOSAL WOULD OPEN THE DOOR TO ELECTRONIC DELIVERY OF RETIREMENT PLAN NOTICES/DISCLOSURES

Hodgson Russ Employee Benefits Newsletter  
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In October, the Department of Labor (DOL) published a *proposed* rule that offers a new, additional electronic safe harbor option that retirement plan sponsors would be able to use to furnish notices and disclosure to participants and beneficiaries. (84 Fed. Reg. 56,894, 10/23/2019). Retirement plan sponsors who want to make notices and disclosures accessible on a website, rather than sending paper documents through the mail, would have the option of doing so, if they satisfy certain conditions. The DOL believes the proposed new rules would reduce the costs (an estimated \$2.4 billion over the next 10 years) and burdens associated with the production and delivery of many of the notices and disclosures retirement plans are regularly required to furnish to participants and beneficiaries. Note that the new electronic safe harbor would *not* apply to notices and disclosures regularly required to be furnished by welfare benefit plans.

Current electronic disclosure rules relevant for retirement plan participants who are not “wired at work” prescribe an *opt-in* regime where such participants must affirmatively consent to receive documents and disclosures electronically. The DOL’s new proposed rules prescribe an *opt-out* regime (what the DOL calls a “notice and access” structure) under which a retirement plan would be permitted to make documents accessible online following electronic notice to a retirement plan participant or beneficiary with a valid electronic address (e.g., email address), unless the participant or beneficiary affirmatively *opts out* of electronic notice and access. The new proposed rule, however, would not eliminate the current electronic disclosure rules, and retirement plan sponsors would still be able to rely on the existing safe harbor for making electronic disclosures.

The proposed new safe harbor could be used to furnish “covered documents” that a retirement plan is routinely required to furnish to participants and beneficiaries under Title I of ERISA – documents such as pension benefit statements, summary annual reports, summary plan descriptions, summaries of material modifications, annual funding notices, fee disclosures, blackout notices, etc. However, certain documents (copies of retirement plan documents, trust agreements, etc.) that need only be furnished upon a written request from a retirement plan participant or beneficiary would not be covered under the proposed electronic safe harbor.

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Under the new DOL proposal, an initial written (paper) notice would be sent to those “covered individuals” (participants, beneficiaries, etc.) who have an employer-assigned electronic address (e.g., work email) or who, as a condition employment, provide the employer or sponsor an electronic address (e.g., personal email address). The initial notice would explain that some or all covered documents will be furnished electronically to an electronic address (e.g., website/internet address), include a statement of the right to request and obtain a paper version of a covered document free of charge, describe the right to opt out of receiving covered documents electronically, and explain how to exercise those rights.

A second electronic notice (notice of internet availability) generally would be provided each time there is a new online document posting. The proposed rules also would allow retirement plans to consolidate notices of internet availability in limited circumstances. The notice would need to include, among other things, a brief description of the covered document to be made available online, an internet website address where the document is posted, and directions for requesting a free paper version of the document or opting out of receiving covered documents electronically.

These rules will not be available for implementation until after the DOL’s publication of a final rule, and the DOL has requested comments on the proposed rules which will be considered before the rule is finalized. The fact that the DOL is working toward a more modern, cost-effective rule for furnishing certain required notices and information to plan participants and beneficiaries is seen by many as welcome news. But there also are some critics of the proposed rule that have expressed concerns the rule will unfairly cut off access to plan information by certain demographic groups that may not be sufficiently tech savvy. The timeline for the DOL to finalize and publish a final new rule on electronic delivery of retirement plan notices and disclosures is not yet known.