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**BULLETIN**

**TO:** Retirement Plan Clients  
**FROM:** Saltzman & Johnson Law Corporation  
**DATE:** June 16, 2020  
**RE:** Electronic Disclosures by Retirement Plans

**1. Issue**

May a plan disclose required plan notices and documents electronically?

**2. Answer**

Yes, a retirement plan (but not a health plan) may provide electronic disclosures but with qualification. This Bulletin explains the criteria for electronic disclosures via web-posting or email under the new DOL rule.

**3. Background and Summary of Rule**

On May 27, 2020 the Department of Labor (“DOL”) published a final rule (“Final Rule”) that expanded the safe harbors for allowing retirement plan administrators to *voluntary* use electronic means to deliver required disclosures to plan participants. See 85 FR 31884. The Final Rule goes into effect on July 26, 2020. The Final Rule does not supersede or replace the 2002 safe harbor and the 2002 safe harbor remains in effect. The Final Rule provides an additional *option* to retirement plans to increase flexibility when providing required disclosures to plan participants, rather than sending potentially large volumes of paper documents through the mail. Notably, the 2002 safe harbor requires participants to affirmatively opt-into electronic disclosure, while the 2020 Disclosure Regulations require participants to affirmatively opt-out.

In 2002 the DOL issued a regulation that provided a safe harbor for plan sponsors and plan administrators to electronically disclose any required notices under ERISA. See 29 CFR §2520.104b-1; see also DOL Field Assistance Bulletin 2006-03 (FAB 2006-03), DOL Technical Release 2011-03 and DOL Technical Release 2011-03R. However, that safe harbor limited electronic distribution of the required documents to two groups: 1) participants with work-related computer access and 2) individuals without work-related computer access who affirmatively consent to receiving communications electronically. This limitation was problematic with the construction-industry and/or multiemployer retirement benefit plans as the majority of participants do not readily have work-related computer access.

Under the new safe harbor provided by the Final Rule, no such limitation is placed on when plan participants may receive required plan disclosures electronically. The Final Rule permits two optional methods for electronic delivery:

- A) Notice-and-Access via Website Posting. Plan administrators may post covered documents on a website if appropriate notification of internet availability is furnished to the electronic addresses of covered individuals.
- B) Electronic Mail (E-Mail) Delivery. Alternatively, plan administrators may send covered documents directly to the electronic addresses of covered individuals, with the covered documents either in the body of the email or as an attachment to the email.

#### 4. Scope

Under the Final Rule the new safe harbor only applies to “covered documents.” Under ERISA, covered documents are limited to those related to “employee pension benefit plans.” *See* ERISA § 3(2). Therefore, the Final Rule does not apply to required disclosures for employee welfare benefit plans.

Furthermore, the Final Rule only applies to “covered individuals.” A covered individual is any individual entitled to a covered document who either provides an electronic address to receive a notice of internet availability or is assigned an electronic address for employment related purposes. This includes an email address or internet-connected mobile-computing-device number, such as a smartphone. An electronic address cannot be assigned to be used solely for purposes of complying with the Final Rule safe harbor; the address must have another employment related purpose.

The Final Rule guarantees covered individuals the right to request and receive paper copies of specific covered documents or to globally opt out of electronic delivery altogether. Plan administrators are prohibited from charging covered individuals a fee in connection to requesting paper documents and are prohibited from having procedurally cumbersome or complex process for exercising their right. A covered individual must receive multiple reminders, on different mediums, of these rights. Therefore, a participant’s initial decision against opting out of electronic delivery is not permanent and can be revisited with each reminder or at any time.

Plan administrators must utilize appropriate systems and technology to alert when covered individuals’ electronic addresses have become invalid or inoperable. If an electronic communication is undeliverable, the plan administrator must try to locate the correct address and resolve any other issues that are relatively easy to fix. For inactive participants, plan administrators must ensure the continued accuracy and availability of electronic addresses or obtain new electronic addresses that allow for electronic delivery of covered documents once a participant becomes inactive. Plan administrators must treat covered individuals who are more difficult to locate as having opted out of electronic delivery and revert back to paper disclosures.

#### 5. Notice and Access via Website Posting

##### A. Initial Paper Notice

Before an administrator can rely on the notice-and-access safe harbor, it must first issue an initial paper notice to the covered individual (which can be included with the standard enrollment packet). The paper notice must contain:

- Statement that the way they currently receive disclosures is changing and that covered documents will be issued electronically to an electronic address;
- Identification of the electronic address that will be used;

- Any instructions required to access the covered document;
- Warning that the covered document is not required to be available on the website for more than one year or until superseded, if later;
- Statement of the right to request a paper copy of the covered document for free, and an explanation of how to do so;
- Statement of the right to opt of electronic delivery entirely, free of charge, and receive only paper copies, and an explanation of how to do so.

B. Annual Electronic Notice

In addition to the initial notice, plan administrators must also provide an annual electronic notice of internet availability (“NOIA”) for each covered document that uses the method. A NOIA must be furnished each time a covered document is made available online, though a plan administrator may use a combined Electronic notice below (discussed below). A NOIA must contain:

- Prominent statement that reads: “Disclosure About Your Retirement Plan.”
- Statement that reads: “Important information about your retirement plan is now available. Please review this information.”
- Identification of the covered document by name.
- Brief description of the document, if the document’s name does not reasonably convey the nature of the covered document.
- The web address or hyperlink where the covered document is available.
- Statement of the right to obtain a paper copy of the covered document at no charge, and an explanation of how to exercise that right.
- Statement of the right to opt out of electronic delivery and obtain only paper copies of covered documents.
- Cautionary statement that the covered document is not required to be available for more than one year, or, if later, after it is superseded.
- Telephone number to contact the administrator or designated representative.

The NOIA may not contain anything other than the above information, plus:

- Pictures, logos, etc.
- Statement to the covered individual on whether any action by the covered individual is invited or required, and how to take such action, or whether no action is required.

The NOIA (like a SPD) must be written in a manner calculated to be understood by the average plan participant. It must also be provided separately from any other documents or disclosures provided to covered individuals, except if it is part of a combined notice. Furthermore, the system for providing the NOIA must be designed to alert the plan administrator if a covered individuals’ electronic address is inoperable or becomes invalid. If the plan administrator is alerted to an invalid address, the administrator must promptly take reasonable steps to cure the problem or

treat the individual as having opted out of electronic delivery, in which case the disclosure must be provided in paper for as soon as reasonably practicable.

### C. Combined Electronic NOIA for Covered Documents

A combined electronic NOIA gives the administrator the option to issue a single notice with respect to multiple covered documents. The notice may incorporate or combine the required content of a NOIA for each of the covered documents. A combined electronic notice must be furnished once every plan year and no more than 14 months after the date it was last furnished.

Documents for which a combined notice may be used include the following:

- Summary of Plan Description;
- Summary of Material Modification;
- Summary Annual Report;
- Annual Funding Notice;
- Investment Related Disclosures;
- Qualified Default Investment Alternative Notice;
- Pension Benefit Statement;
- Any covered document or information that 1) must be furnished annually, rather than after a specific event, and 2) does not require action by a covered individual by a particular deadline;
- Any covered document, if authorized by the DOL; and
- Any applicable notice required by the Internal Revenue Code, if authorized by the IRS.

### D. Website Posting

The plan administrator must ensure that a website is available for covered individuals to access covered documents. The administrator must “take measures reasonably calculated to ensure” that the covered document:

- Is available on the website by the required date of disclosure;
- Remains for at least one year or, if later, until superseded;
- Is presented in a manner calculated to be understood by the average plan participant;
- Is presented in a widely available format that is suitable both to be read online and to be printed clearly on paper, and in which the document can be permanently retained electronically; and
- Can be searched electronically by numbers, letters, or words.
- Take measures reasonably calculated to ensure that the website protects the confidentiality of covered individuals’ personal information, if any.

### E. Temporary Unavailability of Covered Documents

The DOL anticipated that electronically available covered documents may from time to time become unavailable due to technical maintenance or unforeseeable circumstances beyond the administrator's control. In such instances, a Plan is still in compliance to the safe harbor if:

- The period of unavailability is "reasonable;"
- The administrator has "reasonable" procedures in place to alert a participant if the electronic address is invalid or inoperable; and
- The administrator takes prompt action to ensure the covered document becomes available as required by the Final Rule as soon as practicable after the earlier of the time the administrator (a) knows or (b) reasonably should know of the temporary unavailability.

### 6. Electronic Mail (E-Mail) Delivery

Aside from Notice-and-Access via Website Posting, the Final Rule also allows plan administrators to deliver covered documents using an email address. If this method is used, a NOIA is not required. If using email delivery, the document must be delivered no later than the date on which it is required to be furnished, and that it be sent to an email the individual provides, or is assigned, to receive covered documents. The email method requires the plan administrator to send the covered individual an email that:

- Includes the covered document as the body of the email or as an attachment;
- Includes a subject line that reads "Disclosure About Your Retirement Plan;"
- Identifies the covered document as required in an electronic NOIA, if the covered document is an attachment;
- States an individual's rights to obtain a paper copy at no charge, as required in an electronic NOIA;
- States an individual's right to opt out of electronic delivery, as required in an electronic NOIA;
- Provides a telephone number to contact the administrator or designated representative, as required in an electronic notice (above); and
- Is written in a manner calculated to be understood by the average plan participant.

As with the Notice-and-Access option, the email option requires that the covered document:

- Is presented in a manner calculated to be understood by the average plan participant;
- Is presented in a widely available format that is suitable both to be read online and to be printed clearly on paper, and in which the document can be permanently retained electronically; and
- Can be searched electronically by numbers, letters, or words.