



BENEFIT NEWS BRIEFS

DOL Issues Interim E-Disclosure Policy Under Participant Fee Disclosure Regulations

The Department of Labor (DOL) issued *Technical Release 2011-03* which sets forth an interim policy regarding the use of electronic media to satisfy disclosure requirements under the DOL's final participant-level fee disclosure regulation at 29 CFR Section 2550.404a-5. While the use of electronic media for benefit disclosures is more limited in the multiemployer building and construction industry trades, over time more plans may opt to use such electronic disclosures for ease and cost-savings.

For a refresher, see [Benefit News Briefs 2010-75](#) for details on the final fee disclosure regulation. The participant fee disclosure regulation requires plan sponsors to disclose more information about plan and investment costs to workers who direct their own investments in *ERISA*-covered defined contribution plans including 401(k) plans and other individual account retirement plans.

Under the final regulation, plans generally have until at least May 31, 2012 before they must comply with the disclosure requirement. See [Benefit News Briefs 2011-44](#) for more on the effective date.

The Technical Release is available online at www.dol.gov/EBSA/pdf/tr11-03.pdf or by "[clicking here.](#)"

The *Technical Release* allows plan administrators to furnish information required under the participant disclosure regulation electronically including the use of continuous access websites, if certain conditions and safeguards are met. Under the *Technical Release*, the DOL will not take enforcement action based solely on a plan administrator's use of electronic technologies to make the required disclosures under the participant fee disclosure regulation if the administrator complies with the conditions in the *Technical Release*.

The relief under the *Technical Release* applies to two circumstances:

DISCLOSURES INCLUDED IN PENSION BENEFIT STATEMENTS

Disclosures required by Section 2550.404a-5(c) that are included in a pension benefit statement in accordance with Section 2550.404a-5(e)(1) or (e)(2) may be furnished in the same manner that the other information included in the same pension benefit statement is furnished.

For example, if the pension benefit statement information is furnished through a secure continuous access Web site in accordance with the guidance provided under *Field Assistance Bulletin (FAB) 2006-03*, then the information included as part of the pension benefit statement in accordance with Section 2550.404a-5(e)(1) or (e)(2) may also be furnished electronically in the same manner. For more on *FAB 2006-03* see [Research Memo 2006-67](#).

DISCLOSURES NOT INCLUDED IN PENSION BENEFIT STATEMENTS

The following discussion is mostly verbatim from the Technical Release.

General

Disclosures required by Section 2550.404a-5 that are not included in a pension benefit statement in accordance with Section 2550.404a-5(e)(1) or (2) may not be furnished electronically under the guidance provided by *FAB 2006-03*. The plan administrator may use the safe harbor of Section 2520.104b-1(c) to furnish such disclosures through electronic media.

The safe harbor of Section 2520.104b-1(c) is limited to individuals who meet the requirements of one of the following classifications:

Integral Part of Duties. The safe harbor applies to participants who have the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee and with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties. See 29 CFR 2520.104b-1(c)(2)(i).

Affirmative Consent. The safe harbor also applies to other participants (e.g., retirees, former employees, and active employees who do not use a computer as an integral part of their duties), beneficiaries (e.g., surviving spouse, alternate payees), and other persons entitled to disclosures under title I of ERISA who affirmatively consent to receiving disclosures through electronic media in the manner prescribed by the regulation. See 29 CFR 2520.104b-1(c)(2)(ii).

Alternatively, pending further guidance, a plan administrator may furnish such disclosures through electronic media in accordance with the conditions described below:

Conditions

Except as provided under the Special Transition Provision of paragraph 7 below, all of the conditions of paragraphs 1 through 6, below must be satisfied:

1. Voluntary Provision of E-mail Address

Participants and beneficiaries entitled to receive information under Section 2550.404a-5 must voluntarily provide the employer, plan sponsor, or plan administrator (or its designee) with an e-mail address for the purpose of receiving disclosures required by Section 2550.404a-5. The e-mail address must be provided in response to a request accompanied by an Initial Notice, as described in paragraph 2 below. If the provision of an e-mail address is a condition of employment or participation in the plan, such e-mail address shall not be treated as being provided voluntarily. If a participant, however, is required to provide an e-mail address electronically in order to access a secure continuous access Web site housing the required disclosure, the provision of such e-mail address is considered voluntary where an Initial Notice is provided in accordance with paragraph 2 below.

2. Initial Notice

The Initial Notice must be clear and conspicuous, provided contemporaneously and in the same medium as the request for the e-mail address and contain the following information:

- a. A statement that providing an e-mail address for the receipt of the required Section 2550.404a-5 disclosures is entirely voluntary, and that as the result of providing the e-mail address, the required disclosures will be made electronically;
- b. Identification or a brief description of the Section 2550.404a-5 information that will be furnished electronically and how it can be accessed by participants and beneficiaries;
- c. A statement that the participant or beneficiary has the right to request and obtain, free of charge, a paper copy of any of the Section 2550.404a-5 information provided electronically and an explanation of how to exercise that right;
- d. A statement that the participant or beneficiary has the right, at any time, to opt out of receiving the Section 2550.404a-5 information electronically and an explanation of how to exercise that right; and
- e. An explanation of the procedure for updating the participant's or beneficiary's e-mail address.

3. Annual Notice

Commencing with the year beginning after the year that the participant or beneficiary voluntarily provided his or her e-mail address in accordance with paragraph 1 above, and annually thereafter, the plan administrator shall furnish

an Annual Notice to each such participant or beneficiary. For purposes of this paragraph 3 “year” means a calendar year, plan year, or any other 12-month period selected by the plan administrator.

The Annual Notice must contain the information set out in subparagraphs b. through e. of paragraph 2 above. The Annual Notice must be furnished on paper in accordance with 29 CFR 2520.104b-1(b). Alternatively, the plan may furnish the Annual Notice electronically by sending it to the e-mail address on file for the participant or beneficiary if there is evidence that such participant or beneficiary interacted electronically with the plan after the date the Annual Notice for the preceding year was furnished (or in the case of the first Annual Notice, after the date the Initial Notice was furnished). Examples of electronic interaction include, but are not limited to: the participant or beneficiary updating, resubmitting, or confirming his or her e-mail address to the plan; the participant or beneficiary sending an electronic message to the plan; logging onto a secure continuous access Web site housing plan information; or the receipt and opening of an electronic message sent by the plan to the participant or beneficiary.

4. Delivery

The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system results in actual receipt of transmitted information (*e.g.*, using return receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of transmitted information, etc.).

5. Confidentiality

The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system protects the confidentiality of personal information.

6. Calculated To Be Understood

Notices furnished to participants and beneficiaries shall be written in a manner calculated to be understood by the average plan participant.

7. Special Transition Provision

With respect to e-mail addresses of participants and beneficiaries that are on file with the employer, plan sponsor or plan administrator (or its designee) on the date specified in subparagraph b. of this paragraph 7 (the “Transition Group”), the conditions in paragraphs 1 and 2 shall be deemed to be satisfied if a Transition Group Initial Notice, described below, is furnished to the Transition Group as follows:

- a. The Transition Group Initial Notice must contain the information set out in subparagraphs b. through e. of paragraph 2 above;
- b. The Transition Group Initial Notice must be furnished no earlier than 90 nor later than 30 days prior to the date the initial disclosures required

- under 29 CFR 2550.404a-5(j)(3)(i)(A) are provided to the Transition Group;
- c. The Transition Group Initial Notice must be furnished on paper in accordance with 29 CFR 2520.104b-1(b). Alternatively, the plan may furnish the Transition Group Initial Notice electronically by sending it to an e-mail address on file for a participant or beneficiary if there is evidence of electronic interaction with the plan, within the meaning paragraph 3 above, during the 12-month period preceding the date the Transition Group Initial Notice is furnished in accordance with subparagraph b. of this paragraph 7.

This Special Transition Provision is not available for an e-mail address established or assigned by the employer, plan sponsor or its or their designee unless there is evidence that such e-mail address was used by the participant or beneficiary for plan purposes during the 12-month period preceding the date the Transition Group Initial Notice is furnished in accordance with subparagraph b. of this paragraph 7.

* * *