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DOL Proposes New Electronic Disclosure Safe Harbor for Retirement Plans

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In April 2011, the U.S. Department of Labor (DOL) requested information from the public on how the DOL could structure a new safe harbor for electronic disclosures under ERISA. The DOL received hundreds of comments from employers and plan sponsors due to this request. Eight years later the DOL has finally answered the call by issuing a proposed new regulation to establish an alternative safe harbor for employee pension benefit plans to provide required ERISA disclosures electronically. The proposal is designed to be an alternative to, rather than a replacement of, the existing disclosure rules. This means that the existing safe harbor for electronic disclosures under DOL Regulation Section 2520.104b-1(c), as well as the general rules under DOL Regulation Section 2520.104b-1(b)(1) are still available for electronic distributions of required ERISA disclosures.

The proposal is a result of the directive in Executive Order 13847 "to make retirement plan disclosures . . . more understandable and useful for participants and beneficiaries, while also reducing the costs and burdens they impose on employers and other plan fiduciaries."

As proposed, the new safe harbor would apply only to retirement benefit plan disclosures, not employee welfare benefit plan disclosures. In that regard, the DOL stated that it is reserving guidance for welfare benefit plans so that it can study the future application of the new safe harbor to documents that must be furnished by welfare benefit plans. This reservation follows the directive of Executive Order 13847, which focuses the DOL's review on retirement plan disclosures. However, in the preamble, the DOL noted that it does not interpret the Executive Order's directive as limiting the DOL's ability to issue additional safe harbors for welfare benefit plans, as any new safe harbor would reduce plan administrative costs and improve the effectiveness of disclosures. The DOL concluded by noting that the DOL would have to consult with the IRS and HHS regarding any additional safe harbors for welfare benefit plans.

The proposed safe harbor for retirement plans adopts a "notice and access" structure that is similar to the structure described in DOL FAB 2006-03 applicable to providing retirement plan statements electronically. While there are several technical details in the proposed regulations and the possibility of more resulting from comments the DOL will receive, the basic proposed structure is a follows:

1. To qualify for the safe harbor, all "covered individuals" must receive a paper copy of an initial notice that by default, all future disclosures will be made electronically. That notice will inform covered individuals that they have a right to receive paper copies of all notices, and provide information on the procedure to opt out of the electronic disclosures default.

2. Unless a covered individual takes affirmative steps to opt out, the covered individual will be defaulted into electronic disclosure. For each notice required under ERISA, those covered employees can be sent electronically a "notice of internet availability" that includes various disclosures about the document(s) to be furnished electronically and participant rights with respect to these documents.

The proposal also contains a request for information on the proposal, including several specific issues for which the DOL is soliciting comments. The proposal does not provide the ability to rely on the electronic disclosure methods currently. The proposed effective date is 60 days after publication of the final rule, and the proposed applicability date is the January 1 following publication of the final rule. The proposal also solicits comments on whether the effective and application dates should be the same. Comments are due no later than November 22, 2019.

In future blog entries we will delve more deeply into the proposed new safe harbor, including its practical application as compared to how employers are handling electronic disclosures currently.