



# The Brave New World of *E-Delivery*

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## DOL guidance has advanced the methods through which plan participants may receive required disclosures and plan information in a world increasingly dominated by electronic communications.

**T**he Pension Protection Act of 2006 (PPA) is recognized as one of the most sweeping changes in the federal framework for employer-sponsored retirement plans. As the U.S. Department of Labor and the Internal Revenue Service have rolled out regulations and other guidance on the PPA, plan sponsors and retirement plan service-providers have scrambled to adjust to the new requirements.

One such requirement has been the extensive disclosure requirements for DC plans. One disclosure requirement that needed DOL guidance before the full impact was felt involved the participant disclosure requirements under DOL Reg. §2550.404a-5 — better known as the participant disclosure rule. In 2012, plan administrators experienced how the new participant disclosure regime intersected with the existing DOL guidance on the methods by which participant disclosures may be made.

Some background in this area is useful. On Sept. 13, 2011 (five years after the PPA was enacted), the DOL issued an interim rule establishing a policy under which plan administrators could use electronic media to satisfy the participant disclosure requirements under the participant disclosure rule. DOL guidance was necessary because the PPA created changes in the participant disclosure regulation requiring plan administrators to make additional specific disclosures to plan participants regarding fees and expenses paid from their individual accounts.

Following concerned comments from plan sponsors and service providers, in December 2011 the DOL revised and restated the initial

interim rule in the form of Technical Release 2011-03R. The Technical Release is the latest in a series of DOL guidance that slowly advanced the methods through which plan participants may receive required disclosures and plan information in a world increasingly dominated by electronic communications.

### **THE ORIGIN OF ELECTRONIC DISCLOSURES TO PLAN PARTICIPANTS**

Before the PPA became law, most required disclosures involved participant statements and plan documents, such as the summary plan description and summary annual report. With the publication of the DOL's electronic disclosure "safe harbor" regulations in 1997 and the revisions in 2002 and 2006, the DOL took a conservative approach to using electronic methods for plan-related disclosures (under ERISA §105). The electronic disclosure — or "e-delivery" — safe harbors distinguished between information delivered to:

- participants who have computer access to the plan sponsor's electronic information system as an integral part of their duties (the "Workplace Access Group"); and
- all other participants, beneficiaries, and alternate payees (the "Outside Access Group").

The distinction between the groups is significant for e-delivery purposes. The Workplace Access Group may be provided the information through e-delivery without additional consent. The Outside Access Group must affirmatively consent to e-delivery after being provided a specific notice, and thereafter the plan administrator must monitor the hardware and software requirements and follow-

up with any information necessary to continue access to the plan information.

In each case the plan administrator must take appropriate, reasonable steps to ensure actual receipt of the disclosures and maintain an alternate paper delivery procedure for participants who require or request that means of disclosure instead of e-delivery.

### **THE EFFECT OF THE PPA**

The PPA required a new type of quarterly benefit statements for defined contribution plans, and in Field Assistance Bulletin 2006-03 the DOL provided guidance on delivering these new disclosures. Under FAB 2006-03, the DOL stated that, in addition to the traditional safe harbor disclosure methods described earlier, a plan administrator could provide e-delivery of plan-related disclosures by complying with the regulations under the Internal Revenue Code for delivering plan notices documents, or through a secure website which provides continuous access to benefit information along with an explanation about the participant's right to receive a hard copy. FAB 2006-03 also confirmed that information on directing investments, exercising voting rights, plan administrative expenses and individual expenses (such as annual account fees) could be disclosed through e-delivery along with the rest of the benefit statement.

### **DELIVERY OF INVESTMENT-RELATED FEES AND EXPENSES**

Despite all of this guidance, the DOL had not fully explained how the disclosure of investment-related fees and expenses should be accomplished, even though the final participant

disclosure regulation (published in October 2010) provided that certain fee and expense information may be included in a quarterly pension benefit statement.

The DOL's next attempts to provide additional guidance for the investment-related disclosures required under the participant disclosure regulation were the interim rules, followed by the Technical Release. In these, the DOL discussed which benefit disclosures may be included in the quarterly pension benefit statements (required under the PPA) and which disclosures must be provided separately. The Technical Release confirmed that plan-related information can be included in the pension benefit statements, including the general and administrative fee information, individual account balance information and other data required under the PPA. The Technical Release also confirmed that using an e-delivery continuous access website that complies with the standard for providing pension benefit statements to the Workplace Access Group and the Outside Access Group offers adequate disclosure for plan-related information. Most importantly, the Technical Release discussed the differing requirements for plan-related disclosures and investment-related disclosures to plan participants.

**PERMISSIBLE E-DELIVERY METHODS UNDER THE TECHNICAL RELEASE**

The Technical Release affirmed that certain disclosures must be provided separately, and provides an alternative approach for information which must be provided in a second document (primarily the investment-related disclosures). For information requiring separate disclosure, the plan administrator may either comply with the e-delivery standards under FAB 2006-03 for retirement benefit statements, or use an interim procedure which offers a modified affirmative consent approach.

Under this alternate method, the plan administrator provides an initial notice and an annual notice to participants, written in a manner calculated to be understood by the average plan participant, which includes:

- a statement that the participant can make a voluntary decision to provide an email address for receiving e-delivery of required disclosures;
- a description of the information which will be disclosed through e-delivery;
- the availability of a paper copy of the disclosures, and the participant's right to opt out of e-delivery at any time; and
- the procedure for updating the participant's email address.

The plan sponsor also must take appropriate steps to confirm that the information is successfully transmitted, and to protect the confidentiality of the information sent by e-delivery.

The Technical Release affirmed that there is a limited exception to the "voluntary" provision of an email address which may be used by a plan sponsor or plan administrator who has a participant's email address on file. Under this exception, the plan sponsor may satisfy the initial notice and voluntary requirement by either delivering a paper version of the initial notice, or by emailing the notice to the participant if there is evidence of electronic interaction between the plan and the participant within the last 12 months, and delivering this notice at least 30 and no more than 90 days before the new disclosure rules become effective. (This date was Aug. 30, 2012, for plans that operate on a calendar year.)

**INTEGRATING THE DISCLOSED MATERIALS AND THE E-DELIVERY METHODS**

Following the Technical Release, a plan sponsor should be aware of the different types of disclosed information which must be provided and comply with the appropriate standard for e-delivery, which can be broken down as follows:

Disclosed Material	Methods of e-delivery
Plan documents (SPD, etc.)	Traditional "safe harbor" method
PPA pension benefit statements	Traditional "safe harbor" method or FAB 2006-03 method
Investment Fees and expenses	The FAB 2006-03 method or the alternate method under the Technical Release

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**WHERE DOES THIS LEAVE TODAY'S PLAN SPONSOR?**

Plan sponsors now know the methods of e-delivery and the types of disclosures which may be appropriate for each method. Plan sponsors do not have to use e-delivery methods, and may continue to rely on paper disclosures delivered, mailed or posted (when that method is available). E-delivery merely offers quicker and less expensive disclosures, but it may not appeal to all plan sponsors because e-delivery requires keeping records other than an accurate address, and involves ongoing diligence for the notices, software/hardware requirements and information about computer access.

However, e-delivery offers a less expensive and possible simpler method of compliance with the participant disclosure regulation for an employer whose workforce has personal or professional access to computers and who is willing to follow the interaction between the



e-delivery methods and the required disclosures.

The way forward clearly has more employers using e-delivery, and any employer sponsoring a defined contribution plan should consider

e-delivery of the investment-related disclosures as that information is made available under the new requirements. **PC**



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