Qualified Plan Participant Disclosures: The Good, The Bad and The Ugly

presented by:
Sarah Simoneaux, CPC

Typical Pre-ERISA Retirement Provisions

- Normal retirement age: 65 – 70
- 10 – 15 years minimum service to retirement
- Early retirement age: 55
- Women could often retire 5 – 10 years earlier
- NOTHING WAS GUARANTEED!

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Turning Points

1963

1972

1974

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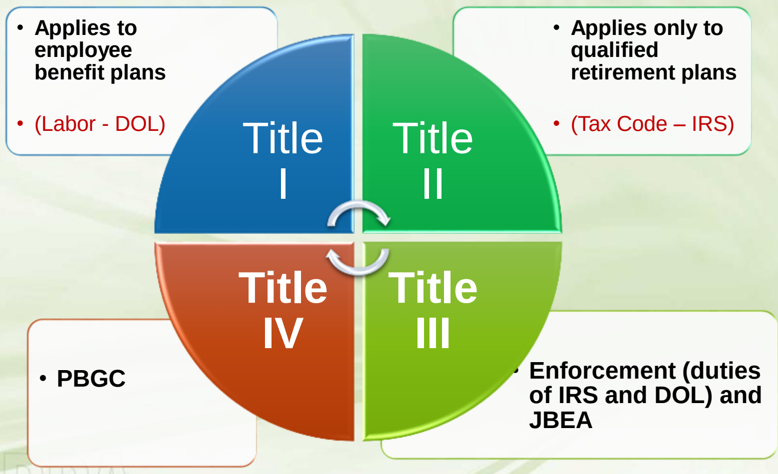
The Signing of ERISA

September 2, 1974

"assuring the equitable character and financial soundness of pension plans"

ERISA preempted state law

Employee Retirement Income Security Act



ERISA - TITLE I (Labor)

REALITY

- A need to protect participants and their beneficiaries and keep them informed

IMPACT

- Established reporting and disclosure requirements
- Prescribed minimum standards for participation (age and service), vesting, accrual and funding
- Fiduciary standards

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ERISA – TITLE II (Tax)

REALITY

- **A need to monitor fairness**
  (can't discriminate in favor of officers, shareholders and "highly compensated"; facts & circumstances)
- **A need to balance deductibility and taxation**

IMPACT

- **Contained amendments to Internal Revenue Code (IRC)**
- **Prescribed conditions for tax qualification (coverage, 415 benefit and contribution limits, 404 deductibility of contributions and taxation of distributions)**
- **Established IRAs**

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Origin of Participant Disclosure: Tax Qualification and Fiduciary Rules

A qualified plan must:

- Be for the exclusive benefit of employees or beneficiaries
- Be in writing and communicated to employees

A plan fiduciary must:

- Must run plan solely in interest of participants and beneficiaries, for exclusive purposes of providing benefits and paying plan expenses

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Reporting and Disclosure Guide for Employee Benefit Plans

U.S. Department of Labor
Employee Benefits Security Administration

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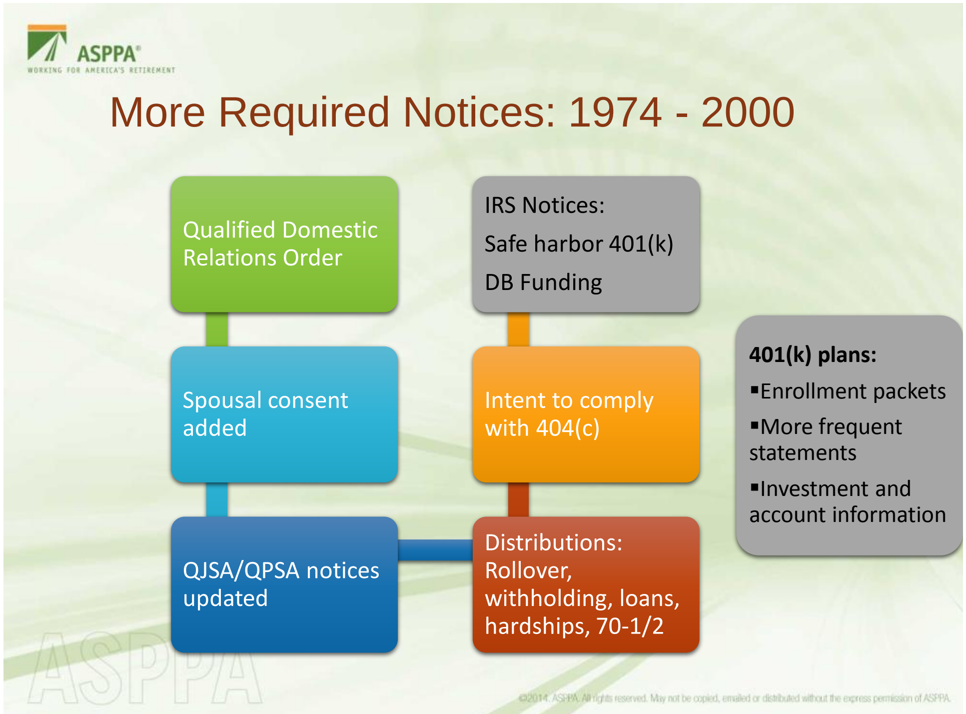
Required Notices: ERISA Plan Basics

- Summary Plan Description
- Summary of Material Modifications
- Summary Annual Report
- IRS Notices-Notices to Interested Parties
  - File for DL
  - Plan Termination
- Other plan information:
  - by request
- Participant statements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More Required Notices: 1974 - 2000
Qualified Domestic Relations Order
Spousal consent added
QJSA/QPSA notices updated
IRS Notices:
Safe harbor 401(k)
DB Funding
Intent to comply with 404(c)
Distributions: Rollover, withholding, loans, hardships, 70-1/2
401(k) plans:
▪Enrollment packets
▪More frequent statements
▪Investment and account information
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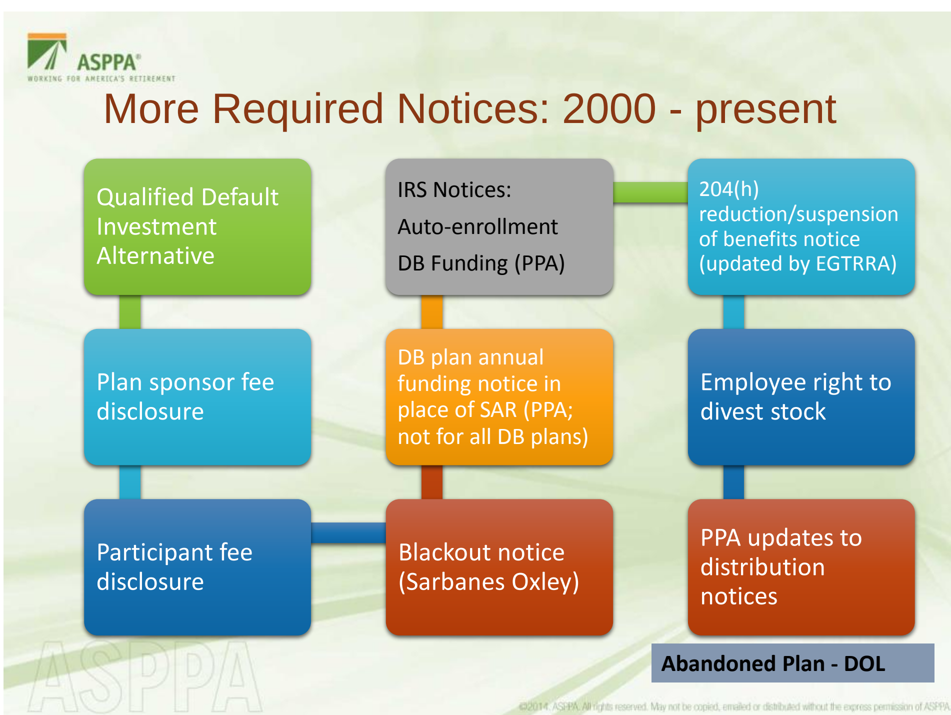
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More Required Notices: 2000 - present
Qualified Default Investment Alternative
Plan sponsor fee disclosure
Participant fee disclosure
IRS Notices:
Auto-enrollment
DB Funding (PPA)
DB plan annual funding notice in place of SAR (PPA; not for all DB plans)
Blackout notice (Sarbanes Oxley)
204(h) reduction/suspension of benefits notice (updated by EGTRRA)
Employee right to divest stock
PPA updates to distribution notices
Abandoned Plan - DOL
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Notice Resources for Plan Sponsors

www.irs.gov/Retirement-Plans/Plan-Participant,-Employee/Retirement-Topics---Notices

www.irs.gov/Retirement-Plans/Retirement-Plan-Participant-Rights

DOL EBSA What You Should Know About Your Retirement Plan:
www.dol.gov/ebsa/publications/wyskapr.html

401(k) Plan Checklist:
www.irs.gov/pub/irs-tege/pub4531.pdf

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SPD ERISA Rights Statement

•Examine, without charge, ***at the Plan administrator's office and at other specified locations***, all documents governing the Plan, and a copy of the latest annual report (Form 5500 Series) filed by the Plan with the U.S. Department of Labor ***and available at the Public Disclosure Room of the Employee Benefits Security Administration.***

• Obtain, upon written request to the Plan administrator, copies of documents governing the operation of the Plan, and copies of the latest annual report (Form 5500 Series) and updated Summary Plan Description. ***The administrator may make a reasonable charge for the copies.***

• Receive a summary of the Plan's annual financial report. The Plan administrator is required by law to furnish each participant with a copy of this summary annual report.

• Obtain a statement telling you the value of your total account under the Plan. ***This statement must be requested in writing and is not required to be given more than once every twelve months.*** The Plan must provide the statement free of charge.

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1977 to 2000

DOL + IRS = Similar disclosure rules

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Disclosure Divergence

IRS:

Reasonableness standard

Can request written doc

Electronic consent OK

DOL:

Delivery proof

Workplace access

Opt-in rule if access not "integral to duties" or not an employee

Change to hardware/software: opt-in again

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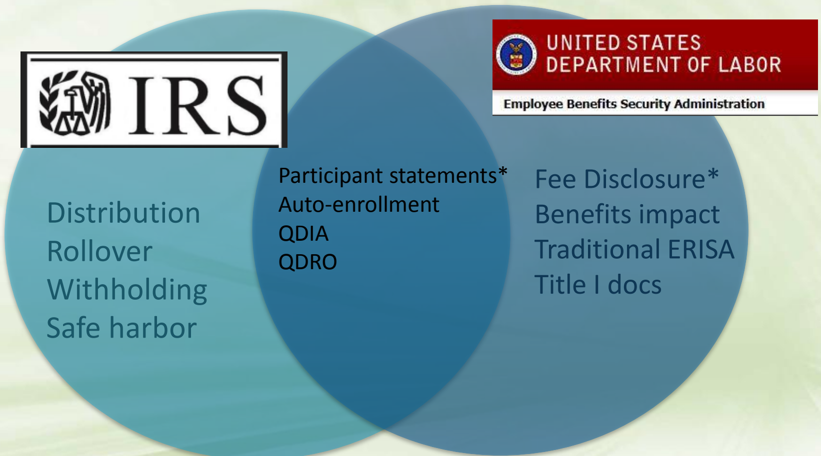
Electronic Notice Disclosure Overview



* DOL continuous access website rules and Fee disclosure modifications

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IRS Rules

- Notice timing and content, election and consent rules that otherwise apply must be met;
- Electronic system notice "no less understandable" than written paper document;
- Electronic system alert participant "when, where and what" of the notice;
- Retain electronic record of notices and participant elections so they can be accurately reproduced for later reference.

Consumer Consent Method (General Method)

Consumer Consent Exemption (Alternative Method)

"effectively able to access" with paper option

IRS Rules: General/Consumer Consent Method

Participant electronic disclosure notice:

- Scope of consent
- Right to withdraw consent
- Right to receive paper
- Hardware and software requirements to get notice
- How to update participant's electronic contact information

Consent to receive electronically before plan provides notice:

- Electronic method that can show participant access **OR**
- By paper consent but then followed by electronic confirmation

IRS Enforcement: Internal Controls

Employee eligibility

- Who determines when an employee is eligible to participate in the plan?
- What steps does this person take to determine if an employee is eligible to participate?
- How does this person track the amount of service an employee has completed?
- How is an employee's date of birth verified?
- Who is responsible for maintaining personnel records?
- How is information from personnel records shared with the plan administrator?
- What steps are taken to notify employees they are eligible to participate in the plan?

Plan distributions

- How are plan loan applications reviewed and approved?
- How are requests for hardship distributions reviewed and approved?
- How does a participant request a distribution from the plan?
- Who reviews and approves distribution requests?
- Who determines a participant's vested percentage when a distribution is made?
- How does the money get from the plan trust to the participant?
- Who is responsible for completing and filing Form 1099-R?

IRS Enforcement: Internal Controls

Plan testing and administration

- Who makes sure the plan document is updated timely?
- Who completes the annual testing for the plan?
- Who determines which participants are highly compensated employees?
- Who reviews the annual testing to ensure that the correct data was used?
- Who determines which participants are key employees?
- Who determines if there are any related employers that could cause a controlled group or an affiliated service group to exist?
- Who reconciles the trust statements to ensure their accuracy?
- Who completes the Form 5500 for the plan?
- Who is responsible for distributing notices to participants?
- How are notices distributed to participants?
- What is the process for correcting errors that are discovered in the plan document or operation?

IRS Rules: Case Study 1

A safe harbor 401(k) plan provides for a safe harbor match equal to 100% of the first 3% of compensation deferred plus 50% of the next 2% of compensation deferred. Five employees and two participants have limited electronic access and have requested paper notices.

For the plan year beginning January 1, 2014, no paper safe harbor notice was given to the five employees or the two participants. This failure is identified in May of 2014.

a. What correction method is advisable with respect to the five employees who first became eligible on January 1, 2014?

b. What correction method is advisable with respect to two participants who became eligible before January 1, 2014?

IRS Rules: Case Study 1

Suppose that the employer also amended the plan to increase the safe harbor match to 100% on the first 5% of compensation deferred. No announcement of this change had been made to the affected employees or participants although it would have been stated in the safe harbor notice had it been given in the requested format.

What correction is available to following three categories of already-eligible employees:

(1) those who had opted out of deferring,
(2) those who had elected to defer less than 5% of compensation, and
(3) those who defer at least 5% of compensation.

IRS Rules: Case Study 2

An oil and gas company offers a 401(k) plan with 6% auto-enrollment. They have employees in New Orleans and working on offshore oil rigs. They have a BYOD policy (Bring Your Own Device) which is explained in the employee handbook given to all new employees on the first day of employment. The handbook states that all notices will be distributed and be accessible electronically on the company website through BYOD wherever the employee works.

1. Several rig workers want to opt-out of auto-enrollment after the three-month opt-out period has passed. They claim they never saw the auto-enrollment notice. However, several other rig employees say they did see the notice on the company website using their cell phones while they were on the rig. What should the employer do?

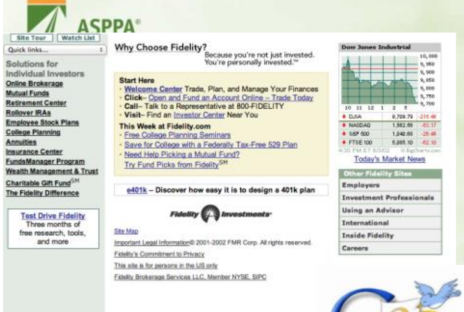
2. Four New Orleans newly hired employees' primary language is Spanish and they do not have web-enabled cell phones. The auto-enrollment notice is not provided in Spanish. There are 20 people working in the New Orleans office and 15 who work offshore. Is the employer required to provide the notices in Spanish? Why or why not? What about their non-web-enabled cell phones and BYOD policy?

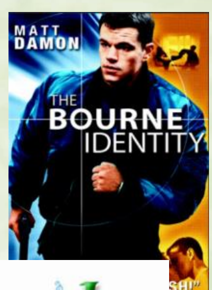
IRS Rules: Case Study 3

A 401(k) plan sponsor has verified that all their participants have electronic access and stores beneficiary designations electronically (using docu-sign) and securely on the recordkeeper's website.

An unmarried key participant with a substantial account balance dies in 2014 and his electronic beneficiary designation (dated in 2014) names his sister as his beneficiary. However, his adult children present a paper beneficiary designation with original signatures dated in 2013.

1. What issues are presented by the paper vs electronic designations?
2. What responsibility (if any) does the recordkeeper have?
3. What should the plan sponsor do given the competing beneficiary designations?





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DOL Rules Overview

DOL Disclosure Rules

- **Style, format and content:** same as paper
- **Delivery:** ensure delivery, notify sender, surveys to verify
- **Notice:** significance, paper version
- **Confidentiality:** systems prevent unauthorized access
- **Consent:** workplace access or opt-in

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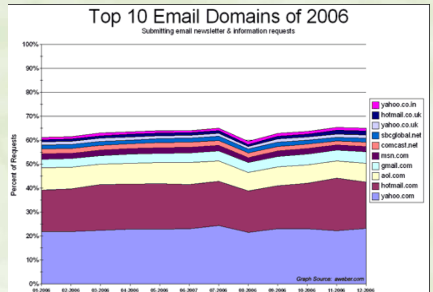
DOL Safe Harbor Consent Rules

No consent required:
- Effectively access electronic documents
- At any location where the participants are reasonably expected to perform their duties as employees
- If access to the electronic information system is an integral part of those duties.

Consent to receive electronically:
- Documents it affects
- Can be withdrawn any time
- Process for updating electronic contact info
- Right to request paper
- Hardware and software requirements

Consent opt-in:
- Affirmatively consent
- Consent demonstrates ability to get docs in electronic form in which they will be delivered
- Change in software/hardware: opt-in again and demonstrate ability to get docs; option for paper



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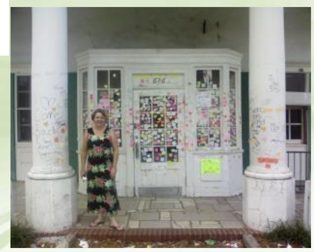


Modified Safe Harbor for Quarterly Account Statements—Field Assistance Bulletin 2006-3 (FAB 2006-3) sets forth more generous rules for the electronic distribution of quarterly account statements.

FAB 2006-3 allows quarterly account statements to be provided through a **secure website**

if the plan administrator provides **an annual notice of electronic availability** and

notifies participants of their **right to request a paper copy of their quarterly account statements** free of charge.

No affirmative approval by the participant is required, even if the participant does not have computer access at his or her workstation.

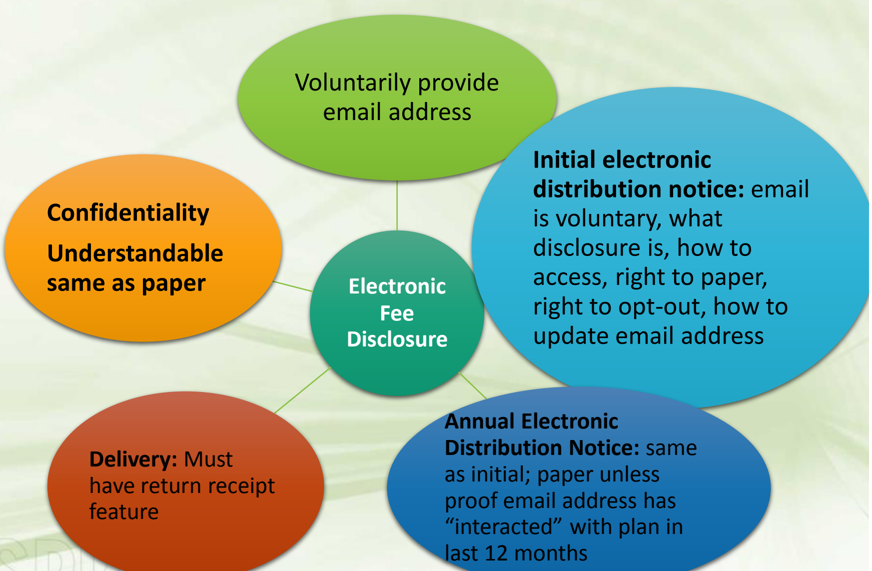
Electronic Distribution of Quarterly Notices Under Technical Release 2011-03R

Under the Technical Release, a plan administrator may provide quarterly account statements electronically, while opting to provide paper copies of all the mandatory fee disclosure requirements of plan-related and investment-related information.

Alternatively, Technical Release 2011-03R confirms that plan administrators may continue to rely on FAB 2006-3 to distribute quarterly account statements, even after the statements have been updated to include the new quarterly plan-related disclosures.

Because the electronic distribution of quarterly account statements is not required, a plan administrator also may provide participants with hard copies of these statements.

DOL Fee Disclosure



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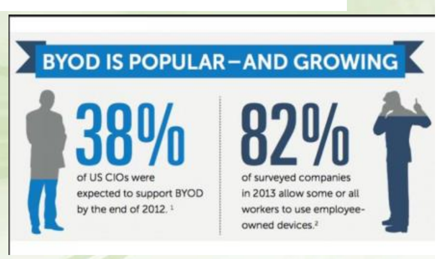
More People Have Cell Phones Than Toilets, U.N. Study Shows

Out of the world's estimated 7 billion people, 6 billion have access to mobile phones. Only 4.5 billion have access to working toilets



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DOL Rules: Changes Needed

A safe harbor for electronic delivery should not be on where an individual accesses electronic information, but that the individual has demonstrated the ability to access the information.

Replace the affirmative consent requirement with an opt out where participants can demonstrate the ability to access electronic documents (consistent with E-SIGN, IRS regulations, and HIPAA privacy rules, and as already adopted by DOL in Field Assistance Bulletin 2006-03)

Replace the "actual receipt" standard under ERISA's general delivery rule with a "reasonable access" standard.

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DOL Rules: ASPPA/ICI White Paper

The Relevant Law and Administration Policy Support a Major Shift toward Electronic Delivery

- **ERISA** does not prescribe how information must be furnished but shows a recent general intent of "reasonably accessible" notice whether in paper, electronic, or other form. Going forward, the best implementation of this approach is flexibility for plans to default to electronic delivery of information where they choose, while retaining the individual's right to select paper notices.
- The **E-SIGN** Act of 2000 has sometimes been used as a basis for caution in using electronic delivery. The primary and clear intent of that law, however, was to encourage online activity, such as the proposal here for defined contribution plans.
- **President Obama's Executive Order 13563** creates the Administration's framework for choosing between electronic and paper disclosure. That Order decisively supports a major shift toward electronic disclosure.

Delivering ERISA Disclosure for Defined Contribution Plans

WHY THE TIME HAS COME TO PREFER ELECTRONIC DELIVERY

Peter P. Swire & Kenesa Ahmad

DOL Rules: ASPPA/ICI White Paper

The current safe harbor thus has a default rule of paper notice. Electronic notice can be sent to the first category of workers only where access to the employer's system is an "integral part" of the worker's duties. Electronic notice can be sent to the second category of workers only with an explicit opt-in, or "affirmative consent." Experience in many other regulatory regimes shows that the default rule often has a powerful effect on actual behavior, and that securing affirmative consent (an opt-in) in many settings is difficult to achieve due to the powerful inertia of many recipients who do not bother to read or act on a message about opting in.[7] Even where recipients shift their activity online, they may not take the extra step of cancelling the paper notice. A 2011 survey found that 60 percent of participants had accessed the plan website during the previous year, but, we understand that fewer take the additional step of cancelling the paper notice.[8] A recipient can receive a paper notice and throw it unopened into a trash or recycling bin, secure in the knowledge that they can go online when they want to check their account or take action.

Given the importance of the default rule, and based on the factual analysis below, this White Paper concludes that the DOL should allow plans the flexibility to choose the default rule. Under this approach, defined contribution plans would be able to use electronic delivery under a general standard that the individual participant has "reasonable access" to electronic delivery, and an opportunity to opt-out of electronic delivery and receive paper notice instead.

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DOL Rules: Case Study 1

A five thousand participant calendar year 401(k) plan changed its target date fund, which is also the plan's QDIA, in May. Issues:

1. What notices are required and who prepares them?
2. Can some or all of the notices be distributed electronically? How?
3. What is a reasonable fee that can be charged to mail required notices?
4. Can the notices be distributed both electronically and on paper? How?
5. The plan sponsor wants to avoid future fees required by paper disclosures. How can they accomplish this?

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DOL Rules: Case Study 2

A plan sponsor received paper annual 404(a)(5) participant disclosure notices for his 35 employees. He assumed that those notices were already covered by the electronic quarterly statements showing plan fees and that the notices he received were for his files. None of the disclosure notices were distributed, although they were accessible on the recordkeeper's website. Issues:

1. What should the plan sponsor do with the annual participant disclosure notices? What is his/her liability?
2. Who is responsible for explaining the paper vs. electronic disclosure rules?
3. Does the access through the r/k website satisfy the rules? If so, how?

DOL Rules: Case Study 3

A plan sponsor is considering hiring a 3(16) co-fiduciary to assist with plan administrative duties. The sponsor would like to know how the 3(16) plan administrator will help with notice requirements. The plan is unbundled with a recordkeeper and a TPA who is willing to serve as the 3(16) plan administrator. The company has 150 employees in 3 different locations, including a group working in Bangladesh.

1. Who is responsible for preparing and distributing the various required notices?
2. Can the 3(16) fiduciary charge the plan sponsor separately for paper notice mailing?
3. What issues do the different locations present?

DOL Rules: Case Study 4

A plan sponsor has hired a 3(16) co-fiduciary to assist with plan administrative duties. The plan uses a bundled service provider for recordkeeping and administration.

1. The 3(16) co-fiduciary has asked to review all distribution notices before distributions, loans or hardship withdrawals are processed. The bundled provider says proper controls for notice distribution are in place and that this additional review is not necessary.
2. The 3(16) provider asks for information on who can receive disclosures electronically and who is receiving them on paper. The bundled provider says all disclosures are provided on paper. The plan sponsor says home office employees receive disclosures electronically, and he has not distributed paper disclosures to those employees per the instructions of the bundled provider.
3. The 3(16) co-fiduciary issues safe harbor notices (paper) and charges separately for them. The bundled provider has already issued safe harbor notices electronically at no charge.

DOL Rules: Case Study 5

A two hundred participant calendar year 401(k) plan is being audited and the plan sponsor provides copies of the 404(a)(5) fee disclosures that were distributed both electronically and on paper (the "not all or nothing" approach). The auditor raises the following issues:

1. The auditor interviewed some non-participating employees and they said couldn't remember opting in to electronic disclosure and didn't receive paper disclosures.
2. He also interviewed two middle managers with six figure account balances who said they had received the disclosures but didn't understand them and didn't receive good explanations when they asked for further information about fees.
3. Although the fiduciary documentation is in good order, the plan sponsor has not benchmarked fees. The auditor says the fees seem high.