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Untangling the Wires

Understanding the rules for electronic disclosure of fee information

AS IS WIDELY KNOWN, the Department of Labor extended the dates for plan-level and participant-level fee disclosure. Under the extension, investment provider to plan sponsor fee disclosures are due July 1, 2012. For a calendar year plan, participant-level disclosures are due May 31, 2012. However, the rules for delivering this information to participants by electronic media remained uncertain even after finalization of the applicable regulations. In the preamble to the participant-level regulations, the DoL indicated its intention to provide guidance on this issue in advance of the regulation's compliance date, so as to ensure appropriate notice for plans. Whether the DoL may be said to have fulfilled this promise is unclear.

Technical Release 2011-03, issued in September 2011, provided a temporary and complicated set of rules for providing fee information to participants. Because of confusion generated by the September release with respect to the proper use of continuous access websites, Technical Release 2011-03R was issued in December 2011. Plan advisers should be aware of the full range of reporting alternatives, including the changes introduced by the technical releases.

Three Electronic Delivery Methods. Before the Technical Releases, there were three alternative regimes that provided rules for electronic delivery of plan information. The first was the general electronic disclosure safe harbor contained in DoL regulations that require a participant to have access to a computer as an integral part of his or her duties or, with respect to participants whose work does not involve use of a computer, as well as retirees, beneficiaries and alternate payees, that requires affirmative consent by the participant, beneficiary or payee to receiving disclosures through electronic media. Obtaining such consent in the manner contemplated by the regulations can be difficult.

In Field Assistance Bulletin 2006-03, the DoL approved two additional methodologies for providing electronic disclosures. Thus, benefit statements can be provided on a continuous basis through a secure access website. Alternatively, disclosure may be made under standards contained in IRS regulations that merely require effective access to the information.

The Interim Method: A Fourth Alternative. Technical Release 2011-03 adds a fourth methodology, the so-called interim method, to the confusing array of electronic disclosure methods described above and provides that the new method may be used to provide investment-related information. The interim method requires meeting six conditions, the first of which is that participants and beneficiaries entitled to receive the information electronically voluntarily provide the employer, plan sponsor or plan administrator with an e-mail address. Furnishing an e-mail address as a condition of employment will not be treated as voluntary and the first requirement of the interim method will not be regarded as having been satisfied if the e-mail address was obtained because it was a job requirement. However, if a participant is required to provide an e-mail address electronically in order to access a secure continuous website housing the required disclosure, the e-mail will be regarded as having been voluntarily provided.

The second condition for use of the interim method requires that the participant's e-mail address be provided in response to a request that is accompanied by an "Initial Notice" to the participant containing information that supports the voluntary nature of the electronic disclosure arrangement, including reference to the ability to opt out of receiving the information electronically and an explanation of the procedure for updating the e-mail address.

Beginning with the year following the year a participant voluntarily furnishes an e-mail address, the participant must receive an annual notice reiterating the information contained in the Initial Notice. The annual notice must be provided on paper unless there is "evidence that the participant or a beneficiary interacted electronically with the plan after the date of the last annual notice."

In addition, the plan administrator must take appropriate steps to ensure that the electronic delivery system results in actual receipt of transmitted information. This condition can be met by using return receipt or notice of undelivered electronic mail features, as well as conducting periodic reviews or surveys to confirm such receipt.

The plan administrator also must take steps to ensure that the electronic delivery system protects the confidentiality of personal information. Finally, the various notices must be written in a manner calculated to be understood by the average plan participant.

In the next issue, we will bring you part 2 of this column, which discusses how the interim method applies to investment-related information.