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eDisclosure Regulation Overview

The Department of Labor (“DOL”) published the final rule on Electronic Disclosure Safe Harbor options for retirement plans on May 21, 2020. It is important to note that these new eDisclosure regulations don’t replace the original eDisclosure Regulations issued on April 9, 2002 but rather provide additional options for plan sponsors.

The Original 2002 eDisclosure Regulations

The original 2002 regulations permit plan sponsors and administrators to electronically distribute notices via email provided that certain requirements are met:

1. An active employee has computer access at the workplace as an “integral part” of the employee’s job duties (i.e., that the employee is “wired at work”).
2. Computer access beyond the workplace for terminated/retired participants and those active employees not “wired at work” requires that the participant *voluntarily give the Plan Sponsor permission to use a personal email address*. The plan sponsor must give clear instructions as to which documents the participant agrees to receive electronically, and provide notice that consent may be withdrawn at any time.

Finally, any electronic disclosure must clearly apprise participants of the importance of the materials being distributed and advise them that they can always obtain paper notices at no cost. For many plan sponsors, the 2002 regulations have provided ample ability to manage the distribution of mandatory disclosures and notices and those procedures need not change. However, for organizations with a large percent of their workforce not “wired at work” the 2002 regulations may be difficult to manage.

The New 2020 eDisclosure Regulations

The new 2020 eDisclosure regulations permit plan sponsors to provide disclosures electronically to “Covered Individuals.” The disclosures may be placed on a website or may be attached to a communication, such as an email or text message.

A “Covered Individual” is any participant, beneficiary, or other individual (such as an alternate payee) entitled to a Covered Document who voluntarily provides the plan sponsor with an email address or smartphone number at which the individual can receive a written *Notice of Internet Availability* (“NOIA”). The email address may be provided by the Covered Individual or it may be assigned by the employer to an employee for employment-related purposes (although not solely for the purpose of receiving such communications). For example, if a construction company doesn’t normally provide an email address to its employees, it can’t start doing so solely to comply with the eDisclosure regulations.

Prior to using new eDisclosure regulations to provide electronic notifications, the plan sponsor must provide each Covered Individual with a paper notice (“Initial Notification”). The purpose of this Initial Notification is to advise Covered Individuals of the framework for disclosures and of their rights under the new framework.

- A statement that the plan sponsor will send information electronically to an electronic address (and identifies that electronic address);
- Any instructions needed about how to access the provided information (such as passwords, a need to download a mobile application, or the need to set up an on-line account to view secure documents);

- A statement that information posted on a website is not required to be available for more than a year or, if later, after it is replaced by a newer version of the document;
- A statement that the participant has the right to request and receive (at no charge) a paper version of any such document and an explanation of how to exercise that right; and
- A statement of the right, free of charge, to opt out of all electronic delivery and to receive paper versions of all Covered Documents, and an explanation of how to exercise that right.

Once the Initial Notification is provided, whenever a plan sponsor provides a new disclosure on a website, it electronically sends Covered Individuals an NOIA, advising them that the document is available online. Alternatively, the Plan Administrator may attach the document to the email and include in the email the information that is normally in an NOIA (*see NOIA requirements below*). The NOIA must be furnished to each Covered Individual for each Covered Document at the time that document is made available on the website. The NOIA is intended to be very short, and cannot contain anything but what is required, other than logos, pictures, or similar design elements.

The NOIA must contain only the following elements (where items are in quotes below, that specific language must be used):

- A prominent statement, such as a title or subject line, that reads: "Disclosure About Your Retirement Plan."
- A statement that reads: "Important information about your retirement plan is now available. Please review this information."
- Identification of the Covered Document by name and, if not self-evident by the name, a brief description of the document.
- Unless the document is attached, the website address with sufficient instructions as to how to locate the Covered Document on the web page to provide ready access, or a direct hyperlink to the Covered Document.
- A statement of the right to request and obtain a paper version of the Covered Document, free of charge, and an explanation of how to exercise this right.
- A clear statement of the right, free of charge, to opt out of the electronic delivery method and an explanation of how to exercise this right.
- A cautionary statement that the Covered Document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the Covered Document.
- The telephone number to contact the Plan Administrator or other designated representative of the plan.

The Plan Administrator may add a statement as to whether action by the Covered Individual is invited or required and how to take such action, or that no action is required.

Recognizing that there are several documents that are provided annually, the eDisclosure regulations provide a special procedure for them to be combined into one notice. The items that may be provided by this annual notice are:

- The SPD;
- Any Covered Document that must be furnished annually, rather than because an event has occurred, and that does not require the Covered Individual to take action;
- Any Covered Document not specifically included above that is authorized in writing by the DOL; and
- Any notice required by the Internal Revenue Code, if authorized by the IRS.

The preamble to the eDisclosure regulations specifically mentions the following as acceptable under the second category above: Summary Annual Reports, QDIA notices, annual (but not quarterly) participant statements, and the annual 404a-5 participant fee disclosure notice. The preamble further provides that the final bullet category

is intended to permit inclusion in the annual disclosure package of the notices that may be disclosed electronically under Treas. Reg. §1.401(a)-21(c). The preamble notes a specific intention to permit the inclusion of automatic contribution arrangement notices.

The NOIA relating to the combined notice is required to be furnished each plan year, no more than 14 months following the date the prior plan year's notice was furnished. For example, suppose the plan sponsor distributes the Summary Annual Report and the 404a-5 participant fee disclosure notice each year. One year, they are posted on October 15th. The following year, they can be posted at any time before December 15th. The 14 months provide the plan sponsor with flexibility as to actual distribution.

The eDisclosure regulations make it clear that nothing changes the deadline for the provision of notices under ERISA. Posted documents must be put on the website on or before they are due. Posted documents must be provided in a widely available format that permits downloading, printing, and searching.

Once posted on the website of choice, the Covered Document must be available on that website for at least one year from the date on which it is posted, or, if later, the date it is superseded by a subsequent version of the Covered Document. For example, suppose a Summary Plan Description is posted on the website (and a NOIA is provided to participants) on January 1, 2025. When a new SPD is posted on January 1, 2030, the old SPD is superseded and may be taken off the website. On the other hand, if a quarterly statement is made available on the website, it must continue to be available for one year, even though another quarterly statement is posted three months later.

The disclosure system adopted by the plan sponsor must be designed to provide an alert if the Covered Individual's electronic address is invalid or inoperable. If that occurs, the plan sponsor must promptly take reasonable steps to cure the problem, such as sending the notice to a valid secondary electronic address that has been provided, asking the Covered Individual for a new address, or treating the Covered Individual as if he or she has opted out of electronic delivery (and providing a paper version of the Covered Document). Similarly, an issue arises when an employee receiving disclosures at his or her company-provided email terminates employment. At that time, the plan sponsor must obtain a new email address or start delivering paper documents.

The new eDisclosure regulations are complex, and must be closely followed by plan sponsors to ensure compliance. They will provide plan sponsors, particularly large plan sponsors, the ability to save significantly on paper disclosure costs.

Please contact us if you want to learn more about Pollard's Notice Distribution Service. We can directly distribute notices to your participants under a supplemental service arrangement and do so for many of our clients who do not have the internal resources to handle this process.