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Department of Labor Finalizes New Safe Harbor for Electronic Delivery of Retirement Plan Disclosures

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On May 21, 2020, the U.S. Department of Labor (the "DOL") finalized its proposed regulation expanding electronic delivery for retirement plan disclosures. On balance, the final regulation is generally consistent with the proposed regulation, although there are a number of key differences, including the addition of a new "direct email" delivery option not included in the proposed regulation.

The final regulation will likely provide welcome relief for plan sponsors and administrators frustrated by the limitations of the current DOL safe harbor for employees with work-related computer access ("wired at work") or who have consented to electronic delivery ("consumer consent"). However, there are detailed content, notice, and timing requirements in the new electronic delivery safe harbor that require careful review before implementation.

Threshold Requirements For Using New Electronic Delivery Safe Harbor

To take advantage of the new electronic delivery safe harbor, there are three threshold rules:

- **Applies Only to Retirement Plan Disclosures**. The safe harbor applies only to the delivery of certain "covered" documents, which generally include any document or information that must be furnished by a retirement plan pursuant to Title I of ERISA, except for any document that must be furnished only upon request. To the disappointment of many commenters on the proposed regulation, the new safe harbor does not apply to health or other welfare benefit plan disclosures.

- **Covered Individual Must Have Provided Electronic Address**. To provide covered documents to an individual under the new safe harbor, the individual entitled to the documents must have provided an "electronic address," such as an email address or internet-enabled smartphone number, to the employer, plan sponsor, or plan administrator. Employer-assigned electronic addresses may be treated as provided by the individual, as long as the electronic address is not assigned for the sole purpose of receiving retirement plan disclosures (*i.e.*, it must have a separate employment-related purpose).

- **Must Distribute Initial Notice on Paper**. Prior to reliance on the safe harbor, a plan administrator must distribute an initial notice on paper to covered individuals, advising them that disclosures will be electronically provided unless they affirmatively opt out. The requirement to provide this notice on paper is absolute, even for individuals who are already "wired at work" or previously provided consumer consent. The initial notice must identify the individual's electronic address and meet other detailed content requirements.

Two Ways to Deliver: "Notice-and-Access" and "Direct Email"

Provided the threshold requirements for relying on the electronic delivery safe harbor are met, plan sponsors and administrators have two options for delivering covered documents electronically:

- **"Notice-and-Access" Option**. This option requires posting covered documents on electronic media, such as a website or mobile application, and notifying covered individuals that the document is posted by sending them a separate "Notice of Internet Availability" (the "NOIA"). The NOIA must comply with detailed content requirements, including an identification of the covered document, the electronic address (or hyperlink to the address) where the individual can access the document, and several required statements that advise individuals of their right to opt out of electronic delivery and to receive free paper copies.

- **"Direct Email" Option**. In lieu of using the "notice-and-access" option described above, covered documents may be sent via "direct email" to covered individuals who have provided email addresses or have employer-assigned email addresses. (This method cannot be used if the only electronic address for an individual is his or her smartphone number.) A covered document may be sent in the body of an email or as an attachment. The email message itself is subject to specific content requirements.

Additional Requirements For Using New Electronic Delivery Safe Harbor

Reliance on the new electronic delivery safe harbor is subject to detailed content, notice, and timing requirements, some of which are noted below.

- **Global Opt-Out of Electronic Delivery**. Covered individuals must be permitted to globally opt out of electronic delivery of all covered documents and receive paper copies at no cost. This marks a change from the proposed regulation, which allowed individuals to pick and choose which documents they wanted to receive on paper. For administrative ease, the regulatory preamble indicates that plan administrators may continue to deliver electronic notices and disclosures to individuals who have opted out, as long as paper copies are also provided.

- **Consolidated NOIA**. As noted above, using the "notice-and-access" option requires providing a NOIA to covered individuals each time a covered document is posted—which could lead to "NOIA fatigue." However, the final regulation permits using a single consolidated NOIA for certain documents in lieu of sending a separate NOIA each time a document is posted. A consolidated NOIA is limited to covering the summary plan description and certain annual disclosures (such as an annual funding notice, SAR, and QDIA notice), as well as other documents authorized by the DOL and the Department of Treasury. Notably, quarterly pension benefit statements are not eligible for the consolidated NOIA, meaning a separate NOIA for each statement is needed. The consolidated NOIA must be provided at least once every plan year (but not less than once every 14 months).

- **Does Not Replace "Wired at Work" or Consumer Consent Safe Harbor; 18-Month Transition Period for Prior Interpretive Guidance**. The new safe harbor is an additional option for electronic disclosure, and does not replace the prior DOL "wired at work" or consumer consent safe harbor for electronic delivery. In addition to the prior DOL safe harbor, the DOL previously issued interpretive guidance permitting electronic delivery for specific documents (pension benefit statements, QDIA notices, and participant-level investment disclosures), provided certain requirements were met. In the interest of establishing a "uniform" electronic delivery system, the ability to rely on the prior interpretive guidance is eliminated. However, recognizing that some time is needed to adjust to the new standard, plan administrators may rely on the interpretive guidance for 18 months following the effective date of the final regulation (July 26, 2020).

- **Bright-Line Retention Rule for Covered Documents Posted on Electronic Media**. If the "notice-and-access" option is used, the final regulation requires that covered documents remain posted and available until superseded by a subsequent version. However, the final regulation provides a bright-line retention rule of at least one year for documents that are not subject to supersession (such as a blackout notice). This rule does not alter the general retention, recordkeeping, and reporting requirements that otherwise apply under ERISA.

- **Plan Administrator Must Have System For Identifying Bounce Backs**. The electronic delivery system must be designed to alert the plan administrator of a covered individual's invalid or inoperable electronic address (a bounce back). If a bounce back is received, the plan administrator must promptly take reasonable steps to cure the problem, by sending the NOIA or email to a secondary electronic address on file, obtaining a new valid and operable electronic address, or treating the covered individual as having globally opted out of electronic disclosures.

- **Maintenance of "Reasonable" Opt-Out Procedures**. The final regulation requires the plan administrator to maintain "reasonable procedures" permitting covered individuals to opt out of electronic delivery and to request paper copies of any document furnished electronically. Presumably, limiting election changes and requests to certain time intervals (*e.g.*, changes to opt-out elections once per quarter) would be "reasonable" under the rule, but further guidance confirming the reasonableness standard in this context would be helpful.

- **Steps to Ensure Continued Viability of Electronic Address After Severance from Employment**. For covered individuals with employer-assigned electronic addresses, the plan administrator must take "measures reasonably calculated" to ensure the accuracy and availability of the covered individual's electronic address or to obtain a new address that enables receipt of covered documents after severance from employment. However, if the individual already receives covered documents via a personal electronic address (*e.g.*, a personal email or smartphone number), the plan administrator is not required to take any additional steps to ensure the continued viability of the electronic address after termination of employment, subject to the otherwise applicable rules in the safe harbor (*e.g.*, maintenance of a system to identify bounce backs).

- **Transition Rule For Electronic Addresses Already On File**. The final regulation requires that the individual provide the electronic address to the plan sponsor or administrator. However, for plan administrators transitioning to the new safe harbor, electronic addresses already in the possession of the plan sponsor or plan administrator may be used without verifying the address was provided “by” the individual, as long as such reliance is in good faith and otherwise complies with the rules of the new safe harbor.

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Plan sponsors and administrators may rely on the new electronic delivery safe harbor immediately. However, there are several practical matters that should be considered before implementing the new safe harbor, such as coordinating with vendors and adjusting existing service agreements that apply to the delivery of retirement plan disclosures. In addition, plan sponsors and administrators that currently rely on the prior DOL interpretive guidance for electronic delivery of certain documents should consider how best to adjust those delivery methods before the end of the 18-month transition period.

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