



WRMarketplace

An AALU Washington Report

The WRMarketplace is created exclusively for AALU members by experts at Troutman Sanders and the AALU staff. WRMarketplace #20-01 was written by **Jim Earle and Christopher P. Stock**.

The AALU WR Newswire and WR Marketplace are published by the AALU as part of the Essential Wisdom Series, the trusted source of actionable technical and marketplace knowledge for AALU members—the nation’s most advanced life insurance professionals.

Thursday, January 9, 2020

WRM#20-01

TOPIC: Electronic Delivery of Required ERISA Notices for 401(k) Plans Made Easier Under New DOL Proposed Rules

MARKET TREND: Plan sponsors and administrators of 401(k) and other tax-qualified retirement plans must comply with numerous notice requirements under the Employee Retirement Income Security Act of 1974 (“ERISA”). Participants and beneficiaries must receive copies of summary plan descriptions, summaries of material modifications, summary annual reports, various investment disclosures, plan statements, and numerous other required notices. In 2002, the Department of Labor (“DOL”) provided two “safe-harbor” methods to electronically deliver these notices. One easy-to-use safe harbor applies to employees who are “wired at work.” The other safe harbor applies to anyone else in the plan – i.e., former employees with accounts, beneficiaries, and alternate payees. These individuals must provide affirmative consent to electronic delivery. While these safe harbors have proved helpful, they are sometimes cumbersome. In October 2019, the DOL proposed a new, additional safe harbor that follows a “notice and access” electronic delivery model. This new safe harbor may be a more convenient and efficient method for furnishing required ERISA notices, especially for individuals who do not qualify for the 2002 “wired at work” safe harbor.

SYNOPSIS: The new proposed safe harbor applies to any participant, beneficiary, or alternate payee who provides the plan sponsor or administrator with an e-mail address or smartphone number. Plan sponsors and administrators deliver required ERISA notices by a combination of (i) providing the covered individuals with an electronic “notice of internet availability” that

identifies a website where the ERISA notice is posted, and (ii) posting the notice on the website (i.e., “notice and access”). For many regular annual required notices, the “notice of internet availability” must be furnished only once per year. A short paper notice is required when the safe harbor is first adopted, but otherwise the process works in a paperless fashion. The proposed rules include details about the form and content of the “notice of internet availability,” the website requirements, and various other details as summarized further below. The proposed rules apply only to required notices for 401(k) and other tax-qualified retirement plans, and do not apply to group medical or other health and welfare plans.

TAKEAWAYS: The new safe harbor is a small but welcomed step forward in reducing some of the administrative burdens related to tax-qualified retirement plans while also recognizing the wired world in which we live. The new safe harbor cannot be relied on until after the proposed rules are finalized. A comment period for the proposed rules closed on November 22, 2019, and it is uncertain when the final rules will be published. Once the new safe harbor becomes effective, plan sponsors will likely want to explore implementing the new safe harbor with their plan administrators.

Current Delivery Standards for ERISA Disclosures

Title I of ERISA generally governs the standards for delivery of all information that is required to be furnished to a plan participant, beneficiary, or other individuals (such as alternate payees under qualified domestic relations orders).¹ As a general rule, ERISA requires that plan administrators use a delivery method reasonably calculated to ensure actual receipt of information by participants, beneficiaries, and other individuals.² Under this standard, hand delivery to the employee at his or her workplace or sending the materials by first class mail are both acceptable methods.

In 2002, the DOL established two safe harbors for use of electronic media as a means of delivering the required ERISA disclosures. The first safe harbor applies to those participants who can effectively access and use the internet at work – i.e., employees who are “wired at work.” The second safe harbor applies to participants, beneficiaries, and other individuals who have affirmatively consented to receive disclosures electronically,³ which is only valid if the individual receives a clear and conspicuous statement before consent, in electronic or non-electronic form, that provides, among other things, the types of documents that the consent applies to and that the consent may be withdrawn at any time.

In either case, the 2002 safe harbors⁴ require that:

- The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents results in actual

¹ 29 CFR §2520.104(b)-1.

² 29 CFR §2520.104(b)-1(b).

³ 29 CFR §2520.104(b)-1.

⁴ 29 CFR §2520.104(b)-1(c).

receipt of transmitted information and protects the confidentiality of personal information relating to the individual's accounts and benefits;

- The electronically delivered documents are prepared and furnished in a manner that is consistent with the style, format, and content requirements applicable to the document;
- Notice is provided to each participant, beneficiary, or other individual, in electronic or non-electronic form, at the time a document is sent electronically, that apprises the individual of the significance of the document (when it is not otherwise reasonably evident as transmitted) and of the right to request and obtain a paper version of such document; and
- Upon request, the participant, beneficiary, or other individual is furnished a paper version of the electronically furnished documents.

Over the years, the DOL has gradually expanded the use of electronic delivery (“e-delivery”) to cover other types of required disclosures. But in general, the 2002 electronic delivery safe harbors remain the two primary methods for e-delivery of required ERISA notices.

New Proposed Electronic Delivery Safe Harbor

On August 31, 2018, President Trump issued Executive Order 13847 (“Order”), which directed the DOL to consider how plan disclosures required by ERISA could be made more effective while also reducing costs to employers. On October 22, 2019, the DOL issued proposed regulations⁵ (the “Proposed Rules”) that, if finalized, would create a new safe harbor allowing ERISA retirement plans to provide plan participants, beneficiaries, and other individuals with a notice stating that the required plan disclosures will be made available on a website (the “safe harbor”). The Proposed Rules utilize a “notice and access” structure for furnishing ERISA required disclosures electronically.

However, as proposed, a plan administrator who wishes to continue to rely on the existing 2002 safe harbor rules for e-delivery or continue to deliver by hand or first-class mail may continue to do so.

Covered Individuals

For purposes of the Proposed Rules, a “covered individual” is a participant, beneficiary, or alternate payee for whom the employer, sponsor, or plan administrator has an electronic address (e.g. email address, smartphone number, etc.). The Proposed Rules require, as condition to use the safe harbor, that the administrator receive an electronic address or number with which to communicate with the covered individual, including a personal or work e-mail address. Employers may automatically use a work e-mail address that it assigns to an

⁵ 84 Fed. Reg. 56894 (oct. 23, 2019). Found at <https://www.federalregister.gov/documents/2019/10/23/2019-22901/default-electronic-disclosure-by-employee-pension-benefit-plans-under-erisa>

employee. Because technology changes so often, the Proposed Rules do not limit the type of device a participant or beneficiary must have to be covered by the safe harbor.

Covered Documents

A plan administrator may only use the safe harbor for pension benefit plans, which includes 401(k) and other tax-qualified retirement plans.⁶ The safe harbor covers documents that are required to be provided to participants and beneficiaries under Title I of ERISA (“covered documents”). The definition of covered documents includes documents that must be sent as a result of the passage time – such as a summary annual report – and documents required as a result of a specific triggering event – such as a summary of material modification (SMM) or blackout notice. The plan administrator has discretion to only apply the safe harbor to certain covered documents.

The Proposed Rules do not apply to employee welfare plans.⁷ However, the DOL has requested comments and has reserved the right to expand the safe harbor in the future.

Notice of Internet Availability

The Proposed Rules require the plan administrator to send one notice to the covered individuals for each covered document. For example, if a plan is required to send six different covered documents to its covered individuals over the course of the plan year, the plan administrator would have to send six notices in order to comply with the safe harbor.

However, the Proposed Rules contain a special rule for certain covered documents. Under this rule, a plan administrator may send a single combined annual notice for all or some of the following documents:

- Summary plan descriptions (SPDs);
- SMMs;
- Summary annual reports;
- Annual funding notices;
- Investment-related disclosures (such as identifying information, performance data, benchmarks, fee information, etc.);
- Qualified default investment alternative notices; and
- Pension benefit statements.

⁶ As defined in ERISA §3(2).

⁷ As defined in ERISA §3(1).

Timing of Notice of Internet Availability

The Proposed Rules require the plan administrator to furnish the notice at the time the covered document is made available on the website. However, in the event the plan administrator uses a combined notice, the timing requirement is satisfied if the combined notice is furnished each plan year. If the combined notice was furnished in the prior plan year, then the combined notice must be sent no later than 14 months following the date the prior plan year's notice was sent.

Additionally, the Proposed Rules require the plan administrator to make the covered document available on the website by the covered document's ERISA deadline.

Content of Notice of Internet Availability

In addition to the timing requirements, the Proposed Rules also require the notice to contain the following information:

- A prominent statement (such as a title, legend, or subject line) that reads, "Disclosure About Your Retirement Plan;"
- A statement that reads, "Important information about your retirement plan is available at the website address below. Please review this information;"
- A brief description of the covered document and why it is important;
- A specific website address that provides ready access to the covered document (or in a combined notice covered documents) (e.g. a direct link to the document or a log-in page that provides a link to the 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 statement of the right to opt out of receiving covered documents electronically, and an explanation of how to exercise this right; and
- A telephone number to contact the administrator or other designated representative of the plan.

The DOL stated in the Proposed Rules that it is considering issuing a model notice.

Form and Manner of Providing the Notice of Internet Availability

Like most participant disclosures under ERISA, the DOL expects the notice to be clear and concise in explaining its content and importance. In order to satisfy the safe harbor, the notice must:

- Be sent electronically to the covered individual's electronic address;

- Contain only the required content, though pictures, logos, or similar design elements may be included, so long as the design is not inaccurate or misleading and the required content is clear;
- Be furnished separately from any other documents or disclosures, including those required by ERISA, sent to the covered individual (unless the exception for combined notices applies); and
- Be written in a manner calculated to be understood by the average plan participant.⁸

Internet Website

The plan administrator is also required to establish and maintain an internet website where covered individuals can easily access the covered documents. The administrator may delegate some responsibilities associated with the website to third party service providers; but, the administrator, as a plan fiduciary, must prudently select and monitor such parties. Additionally, the administrator must take measures reasonably calculated to ensure the website meets certain requirements. For example, covered documents posted on the website must:

- Be available on the website by the applicable ERISA deadline for furnishing the covered document;
- Remain available on the website until it is superseded by a later version;
- Be presented in a manner calculated to be understood by the average plan participant;
- Be available in a widely used format suitable for reading online and printing clearly on paper;
- Be searchable electronically by numbers, letters, or words so participants can quickly find information about specific issues; and
- Be available in a widely used format that allows the document to be permanently retained electronically (e.g., PDF).

A plan administrator must also take reasonably calculated measures to ensure the website protects the covered individual's personal information and confidentiality.

Right to Request Paper Copies and Opt Out

The Proposed Rules require the plan administrator to maintain reasonable procedures to allow a covered individual to request a paper copy of the document free of charge. Furthermore, the Proposed Rules require the plan administrator to establish reasonable procedures to give covered individuals the ability to opt out of e-delivery and receive only paper copies of some or

⁸ For this purpose, a notice that uses short sentences without double negatives, everyday words, active voice, and language that results in a Flesch Reading Ease score of at least 60 will satisfy this requirement.

all of the covered documents. If a participant decides to opt out, then all future covered documents must be delivered in paper, unless the covered individual decides to opt back in to e-delivery.

Initial Paper Notification of Default Electronic Delivery and Right to Opt Out

If a plan administrator decides to utilize the safe harbor, he or she must send an initial notification on paper that some or all of the covered documents will be e-delivered to the participant's electronic address on file. Additionally, the initial notification must notify the covered individual of his or her right to receive the covered documents in paper and that he or she may opt out of e-delivery, including the procedures for exercising such rights.

If the plan is currently using the 2002 safe harbor and wishes to adopt the new safe harbor, the plan administrator must send a one-time notification to each existing employee (including those who provided their affirmative consent under the 2002 safe harbor) notifying them of the plan's intent to rely on the new safe harbor. Thereafter, the administrator must send this notification to each new employee who would be covered by the safe harbor.

Severance from Employment with Plan Sponsor

Under the Proposed Rules, covered individuals may continue to receive their covered documents by e-delivery even after they separate from employment with the plan sponsor. In such case, the plan administrator must take measures reasonably calculated to ensure the continued accuracy of the covered individual's electronic address or obtain the covered individual's new electronic address to ensure the covered individuals' continued access to the covered documents.

Alert About Invalid Electronic Addresses

The Proposed Rules require the system for furnishing the notice to provide an alert to the administrator in case a covered individual's electronic address appears to be invalid or otherwise inoperable. The administrator then must take steps to obtain a new, valid electronic address. If the administrator cannot obtain a new valid address, then it must deem the covered individual to have opted out of e-delivery. As a best practice, plan administrators should keep a secondary electronic address for the covered individual on file and send the notice to the secondary address if they are alerted to an invalid or inoperable primary electronic address. The DOL believes that this requirement, together with other aspects of the Proposed Rules, may help reduce the number of post-employment "lost participants."

Temporary Unavailability

The Proposed Rules require plan administrators to have reasonable procedures in place to ensure that the covered documents are available. However, the Proposed Rules recognize that technological errors do occur and that they may render the covered documents temporarily unavailable. If the documents do become temporarily unavailable, the plan administrator must take prompt action to get the covered documents back online and available as soon as

practicable following the time when the administrator knew or reasonably should have known the documents were unavailable.

Effective Date

If finalized, the Proposed Rules will be effective sixty (60) days after they are published and will apply on the first day of the first calendar year following the date the final regulations are published.

Conclusion

In drafting the Proposed Rules, the DOL found substantial evidence that justifies the expansion of the e-delivery safe harbor rules. A 2017 survey conducted by the U.S. Census Bureau found that 87% of the U.S. population live in a home with internet access and a 2018 survey found that 93% of households that have a defined contribution account had access to or used the internet in 2016. Given these facts, the Proposed Rules, if finalized, have the potential to significantly reduce the costs and burden of providing paper copies of required ERISA disclosures and to improve the effectiveness of disclosures by making them readily accessible to plan participants.

Other laws also impose notice and disclosure requirements that may apply to 401(k) and other tax-qualified retirement plans. The Proposed Rules do not change the e-delivery rules that have been adopted under those other laws. Hopefully, over time, there will be a convergence towards a “notice and access” framework for delivering all required notices and disclosures impacting these plans.