

A GUIDE TO ELECTRONIC DELIVERY OF PARTICIPANT DISCLOSURE MATERIALS

The U.S. Department of Labor (DOL) and the Internal Revenue Service (IRS) issued a series of rules and interpretations around using e-mail and other electronic disclosure methods.

This guide is intended to:

- Provide an overview of relevant electronic delivery rules and interpretations.
- Describe the conditions under which e-mail and other electronic methods for delivering information to plan participants will meet current standards.
- Assist plan sponsors and other fiduciaries who are considering whether to adopt e-mail and other electronic disclosures methods for their plans.

This information is designed to help you, as a plan sponsor or plan fiduciary, make informed choices about using electronic methods to provide information to your plan’s participants.

ELECTRONIC DELIVERY OF PLAN INFORMATION IS NOT “ALL OR NOTHING.”

You might elect to use e-mail to deliver plan information to employees with computer access at work and participants who have affirmatively agreed to receive plan information to an e-mail address. You may still send information by first class mail to those employees who do not have regular computer access at work, and to retirees, alternate payees, beneficiaries and terminated participants. In addition, some information can be posted to a continuously available website after notice. Most plans find that even limited use electronic delivery helps reduce plan costs.

THE PLAN SPONSOR’S ROLE IN PROVIDING PLAN DISCLOSURE INFORMATION TO PARTICIPANTS

Under ERISA, any person responsible for retirement plan management or administrative matters may act as a “fiduciary,” including a plan’s sponsoring employer, plan trustees, or members of plan committee. All retirement plans must name at least one fiduciary to have overall responsibility for plan administrative activities, called the “plan administrator.” The responsibilities of the plan administrator include providing required plan information to plan participants, such as benefit statements and information about plan fees and investment information.

The DOL has established a general standard for delivering plan information to participants. A plan administrator must use measures “reasonably calculated to ensure actual receipt of the material.”

Examples of such methods include:

- First class mail,
- Other classes of mail if return and forwarding postage is guaranteed and address correction is requested, and
- In-hand delivery at an employee’s worksite.

Merely making a disclosure document available or posting it on a bulletin board does not satisfy this general standard.

The DOL and IRS have issued a series of rules and interpretations that explain when e-mail or other electronic disclosure methods also satisfy the “reasonably calculated to ensure receipt” standard.

These include:

- DOL “Electronic Disclosure Safe Harbor” that allows electronic disclosure by the “Wired at Work” and “Affirmative Consent” methods;
- DOL Interpretive and Technical Guidance, which provide for use of “Continuous Access Website” and “Assumed Consent” methods; and
- IRS Media Disclosure Guidance allowing electronic disclosure under a “Guidance Method” and an “Alternative Method”

In general, the Wired at Work and Affirmative Consent methods are allowed for all types of plan information while the other methods are allowed for only some types of information.

DOL ELECTRONIC DISCLOSURE GUIDANCE

SAFE HARBOR

A Safe Harbor provides guidelines for complying with a legal requirement—such as the requirement to deliver information by a method “reasonably calculated to ensure receipt.”

Under the Electronic Disclosure Safe Harbor, the DOL states that as long as a plan administrator takes the steps required in the Safe Harbor, a notice or other electronic means will be considered to have been delivered, as if the information was sent by first class mail. Plan administrators may rely on the Electronic Disclosure Safe Harbor for delivering plan information that is required to be delivered to participants.

Electronic Disclosure Safe Harbor Requirements:

Plan information may be delivered electronically under the Electronic Disclosure Safe Harbor only if all of the following general requirements will be met:

1. The electronic system used must be designed to reasonably assure actual receipt of the information. This may require periodic reviews or surveys to confirm receipt of the electronically delivered information. Also, the plan administrator should be aware of, and follow-up on, undelivered and, to the extent known, unopened e-mail.
2. The system must be designed to protect the confidentiality of the personal information of the participant who receives the information.
3. A participant receiving an electronically delivered document must, at the time the document is delivered, be provided with a notice explaining the importance of the document and the right to receive a paper copy of the disclosure.
4. Electronically delivered documents must be prepared in the style and format applicable to the particular disclosure.
5. Electronically delivered documents must contain all of the information required to be included in the particular disclosure.
6. Upon request, the participant must be provided a paper version of the document.

So long as these requirements are met, plan administrators have flexibility when providing information by electronic delivery methods. For example, a document may be sent in the text of an e-mail or as an attachment to an e-mail. A plan administrator may also send, via electronic or paper mail, a link to the required information on a website.

Electronic disclosure Safe Harbor recognizes two categories for individuals who may receive documents electronically: participants who “affirmatively consent” and employees who are “Wired at Work.”

ELECTRONIC DISCLOSURE SAFE HARBOR

“AFFIRMATIVE CONSENT”

To affirmatively consent, a participant or beneficiary must, before consenting, receive a clear statement describing:

- The types of documents to which the consent would apply;
- That consent can be withdrawn at any time without charge;
- The procedures for withdrawing consent and for updating the individuals address for receiving electronically delivered documents;
- The right to request and obtain a paper version of an electrically delivered document, including whether the paper version will be provided free of charge; and
- Any hardware and software requirements for accessing and retaining the documents.

Additionally, if the disclosure documents are going to be delivered over the Internet, the participant or beneficiary must demonstrate the ability to access information by either consenting or confirming the consent electronically.

“WIRED AT WORK”

This method is limited to current employees participating in a 401(k) or other retirement plans.

To be “Wired at Work”:

- An employees must have the ability to effectively access electronic documents at any location where the employee performs duties as an employee, and
- Using the employer’s electronic information system must be an integral part of the employee’s duties.

This group is not required to give “Affirmative Consent” to receive plan information electronically.

NOTE: “Access” to a computer during working hours is insufficient to satisfy this delivery method; rather access must be an “integral part” of the employee’s duty. Simply providing computer kiosks does not make employees “Wired at Work.”

ADDITIONAL ELECTRONIC DISCLOSURE METHODS APPROVED BY THE DOL

The DOL has issued some additional methods that allow additional electronic delivery methods in certain situations. Unlike the DOL Electronic Disclosure Safe Harbor, which can be used for all types of required plan information, these additional methods may only be used for certain types of the plan information.

Assumed Consent

In connection with the new participation information disclosure requirements the DOL also has issued further guidance relating to the use of electronic methods for delivering information to participants--called Technical Release.

Under Technical Release, the “Assumed Consent” method may be used to delivery information electronically. Specifically, the information that must be provided annually, a participant’s consent for electronic delivery may be “assumed” if:

- The participant is provided an initial notice that contains information similar to what is required under the DOL’s “Affirmative Consent” method;
- After receiving the notice, the participant voluntarily provides the plan administrator an e-mail address; and
- The plan administrator provides the participant voluntarily provides the plan an annual notice similar to the initial notice.

IRS ELECTRONIC MEDIA GUIDANCE

Electronic media guidance is the IRS’s equivalent to the DOL’s Electronic Disclosure Safe Harbor. These methods may be used to deliver most plan information required under the Internal Revenue Code, such as the 401(k) Safe Harbor and Auto Enrollment Notices. The DOL approved the use of the IRS Electronic Media Guidance for delivering quarterly benefit statement information and for delivering notices of investment of the participant account balances in a qualified default investment option or “QDIA”

IRS Electronic Media Guidance provides two methods of electronic delivery of plan information. First, there is the “**General Method**,” which has system, consent and notice requirements that are substantially similar to the requirements under the DOL’s Electronic Disclosure Safe Harbor.

Second, the “**Alternative Method**” allows information to be delivered through any medium so long as the receipt has the “effective ability to access.” This includes electronic information delivery mediums such as e-mail and websites. To rely on the Alternative Method, a plan administrator must, at the time information is delivered, notify participants that they may request, free of charge, a paper copy of the information. Plan administrators who are considering the IRS Alternative Method must determine that a proposed electronic delivery method will meet the “effective ability to access” test, but there is only limited guidance available for making determination.

Here are some considerations:

- In general, a plan administrator must have some evidence that the proposed information delivery medium will permit the participant to access the information. For example, the IRS has stated that it will not be sufficient to send e-mail to participant’s last known e-mail address. It is also not clear whether a receipt will have the ability to effectively access an electronic medium if the recipient does not have a computer in their home. (The spread of smart phones and tablets may be greatly reducing this population, however.)
- Employees may have the effective ability to access information through a worksite computer kiosk, even if not at their desk.
- Neither the IRS nor DOL has commented on a scenario where employer establishes an e-mail account for every employee solely for the purpose of providing ERISA information electronically.

Finally, the IRS Electronic Media Guidance is, generally, considered less restrictive that the DOL’s Electronic Disclosure Safe Harbor. This means that electronic delivery meeting the conditions of the DOL’s Safe Harbor (the Wired at Work or Affirmative Consent methods) will generally satisfy the IRS Electronic Media Guidance.

Disclosure Requirements which may be Electronically Delivered

Disclosure Requirement	Description of Required Information
Summary Plan Description (SPD) and Summary of Material Modifications (SMM)	The SPD provides a summary of the plan document and other key plan information. The SMM describes material changes to information furnished by the SPD.
Summary Annual Report (SAR)	The SAR is a summary of the annual financial report that most plans must file with DOL.
401(k) Traditional Safe Harbor Notice	The 401(k) Safe Harbor Notice provides information about a participant's rights and obligations under a Safe Harbor 401(k) Plan.
Plan and Expense Information for Participant-Directed Plans	For participants in participant-directed plans, plan information, including information about plan fees and expenses. This information generally must be provided before enrollment and annually; some fee information is required quarterly, and may be included in the quarterly benefit statement.
Investment Information For Participant-Directed Plans, Provided in a table or other format that allows comparisons of plan investment options.	Information about plan investment options, including performance and fees, must be provided before the participants initial investment and at least annually, as set forth in the 404a-5 Regulation.
Automatic Enrollment and Qualified Default Investment Alternative (QDIA) Notices	Notice to participants of the investments of their account in a default investment, if the participant does not provide investment directions. For plans with automatic enrollment, a description of the plan and automatic enrollment process, including percentage of salary to be automatically deferred and the plan's default investment and how to opt out of or change the default elections.
Blackout Notice	A notice that a temporary suspension limitation or restriction on directing retirement funds, obtaining loans or obtaining distributions, for more than three consecutive business days is going to be imposed.