

Electronic Disclosure

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Kent Mason



DAVIS &
HARMAN_{LLP}

Background

- Effective for plan years beginning on or after November 1, 2011, significant new participant disclosure regulations apply.
- In the preamble to those regulations, DOL indicates that it plans to revisit its electronic disclosure rules in time so that any new rules can be used to comply with the participant disclosure regulations.



RFI

- The Department of Labor has issued an RFI that:
 - **Indicates that it intends to review the use of electronic media by employee benefit plans to furnish information to participants and beneficiaries.**
 - **Requests information regarding access to and usage of electronic media.**
 - **Requests comments on the appropriate electronic disclosure rules, including time-sensitive disclosures.**
- Comments are due June 6.



Current DOL Regulations

- Under the current DOL safe harbor, electronic disclosure is only permitted in two circumstances. First,
 - **A participant must have access to electronic communications at any location where the participant is reasonably expected to perform his or her duties, and**
 - **Access to the employer's electronic information system must be an integral part of the participant's duties.**



DOL Regulations (continued)

- The second type of individual who can receive electronic disclosures is a participant, beneficiary, or other individual (such as an alternate payee) who consents to electronic disclosure in a manner that demonstrates the ability to access electronic disclosures.



DOL Regulations (continued)

- The administrator must take steps to ensure electronic disclosures are being received, such as notice of undelivered electronic mail features or periodic surveys.
- The administrator must protect personal information.



DOL Regulations (continued)

- When a document is furnished electronically, the administrator must provide a notice of the employee's right to receive a paper copy on request.



Treasury Regulations

- With respect to disclosures required to be in writing, the Treasury rules regarding electronic disclosures are not safe harbors, but rather are required to be satisfied in order to provide disclosures electronically.



Treasury Regulations (continued)

- Electronic disclosures are only permitted under two circumstances. First, the recipient must consent (or confirm consent) in a manner that reasonably demonstrates that the recipient can access the electronic disclosure. Oral communications are not permitted under this rule.



Treasury Regulations (continued)

- Second, the electronic medium used must be a medium that the recipient has the effective ability to access.



Treasury Regulations (continued)

- The recipient must be notified that he or she has the right to receive a paper copy (at no charge in the case of the second rule).



DOL Field Assistance Bulletin (“FAB”) 2006-3

- Under the FAB, the use of electronic media to provide benefit statements pursuant to the Treasury or DOL regulations shall, pending further guidance, be permitted as good faith compliance with the benefit statement rules.



DOL FAB 2006-3

- The following also constitutes good faith compliance with the benefit statement rules: availability of the benefit statement on a secure website to which participants have continuous access, provided that certain rules are satisfied.



DOL FAB 2006-3

- The conditions for use of a website are:
 - **Participants and beneficiaries are notified of how to access their benefit statements.**
 - **They are also notified of their right to request paper benefit statements free of charge.**
 - **The notices may be provided by paper, by use of the DOL regulations, or by use of the Treasury regulations.**
 - **The notices must be provided before the benefit statement is required and annually thereafter.**



Council Plan

- The Council will be submitting a comment letter on the RFI by June 6, 2011
 - **Subject to member input, the Council is considering a recommendation that while the RFI responses are being considered, the DOL permit the FAB approach for all notices (with adjustments for time-sensitive disclosures), pending further guidance.**
 - **Data on the cost of making paper disclosures—and who bears the cost—would be helpful.**
 - **Information on participants' and plan sponsors' reactions to the FAB approach would also be helpful.**



Council Plan (continued)

- With other trade associations, the Council is planning to sponsor an academic study in response to the RFI.
- The study would also be submitted to Treasury and the IRS.

