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## Labor Department Releases Interim Guidance on Electronic Delivery of Fee Disclosures for Participant-Directed Plans

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*On September 13, 2011, the U.S. Department of Labor (“DOL”) in Technical Release 2011-03 (the “Release”) released interim guidance on how plan administrators may use electronic media to deliver the newly required fee disclosures for participant-directed plans. Plan administrators of 401(k) plans and other applicable individual account plans should carefully review this guidance and determine how they can electronically distribute the fee disclosure information to participants and beneficiaries given the parameters specified in the Release.*

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### **Fee Disclosure Rule for Participant-Directed Plans**

In October 2010, the DOL issued final regulations detailing how plan administrators of participant-directed individual account plans (such as 401(k) plans) must provide detailed disclosures of plan and investment-related information (including fee and expense information) to plan participants and beneficiaries of these plans (the “Final Rule”). Further details about these disclosure requirements can be found in our previous Client Advisory “[Labor Department Issues Final Regulations on Fee Disclosures for Participant-Directed Plans](#).” In general, the rule applies for plan years beginning on or after November 1, 2011. However, under a transition rule, the earliest date on which the initial disclosures must be made to participants and beneficiaries of calendar year plans is May 31, 2012. For further details on the transition rule, see our previous Client Advisory “[Deadlines Extended Again for Pension Plan Fee Disclosures](#).”

### **DOL Guidance on Electronic Delivery**

The Final Rule reserved a subsection for how to furnish the required disclosures to participants and beneficiaries to give the DOL an opportunity to request and review public comments on the DOL’s current approach to electronic delivery of information required under ERISA, including its “safe harbor” rule. The DOL has received approximately 80 comments in response to that request. However, the DOL is unlikely

to provide any further definitive guidance on its general approach to electronic delivery before the Final Rule becomes applicable to participant-directed individual account plans.

In light of the impending applicability date of the Final Rule, the DOL released interim guidance describing how plan administrators may distribute the required disclosures until the DOL issues further definitive guidance on the subject of electronic delivery. The interim guidance provides two approaches for electronically distributing the fee disclosure information to plan participants and beneficiaries. One approach is available for information that is included in the pension benefit statement required under ERISA Section 105, while the other approach is for all other disclosures required under the Final Rule.

#### **Disclosures Included in the Pension Benefit Statement**

The Final Rule provides that certain disclosures of plan-related fee and expense information (*e.g.*, fees charged for loans and fees and expenses for general plan administrative services) may be included in the pension benefit statement as long as the timing requirements for disclosure under the Final Rule are otherwise met. Under the DOL's interim guidance, these disclosures may be furnished in the same manner as the other information in the pension benefit statement. Pursuant to Field Assistance Bulletin 2006-03 ("FAB 2006-03"), pension benefit statements currently may be furnished (1) in accordance with the DOL's electronic delivery "safe harbor" under 29 CFR 2520.104b-1(c), (2) in accordance with the electronic delivery rules for certain tax-qualified plan notices, or (3) through a secure website where participants have continuous access, provided certain notice requirements described in FAB 2006-03 are met. Affirmative consent by the participant is not required to furnish the pension benefit statement (and now the applicable fee disclosure information) through the secure website option.

#### **Disclosures Not Included in the Pension Benefit Statement**

The Release provides that disclosures under the Final Rule that are not included in the pension benefit statement (*e.g.*, investment-related performance data and benchmarks) cannot be provided under the methods described in FAB 2006-03. Instead, the Release provides two options for electronically providing these other disclosures to participants and beneficiaries.

First, the disclosures may be furnished by utilizing the DOL's current "safe harbor" for electronic delivery under 29 CFR 2520.104b-1(c). Under this safe harbor, information may be delivered through electronic media—with proper notice of its electronic availability—if the intended recipients meet one of the following requirements:

- **Work-Related Electronic Access:** a plan participant who has the ability to effectively access the electronic document at a location where he or she is reasonably expected to perform his or her job duties and such access to the employer's electronic information system is an integral part of those job duties, may receive the disclosure electronically.
- **Affirmative Consent:** all other plan participants, beneficiaries and other individuals entitled to the disclosures may receive the information electronically if they affirmatively consent (in accordance with the consent requirements specified under the safe harbor) to receive electronic disclosures.

Second, until further guidance is provided by the DOL, plan administrators may furnish the required fee disclosure information electronically by using the following interim process:

- **Initial Notice:** The plan administrator must provide an “initial notice” that includes the following:
  - a statement indicating that the required disclosures will be made electronically, if the individual voluntarily provides an e-mail address for receiving the disclosures electronically;
  - a brief description of the disclosures that will be furnished electronically and how such information can be accessed;
  - a statement that the individual has the right to request a paper copy of the electronically provided information, free of charge;
  - a statement that the individual may opt out at any time of receiving the information electronically (and the process to opt out of the system); and
  - a procedure for updating the individual’s e-mail address.
- **Voluntary Provision of E-mail Address:** In connection with the initial notice, the individual must voluntarily provide an e-mail address for purposes of receiving electronic disclosures. The Release emphasizes that this truly must be a voluntary choice on the part of the participant or beneficiary and provides certain examples of when an e-mail address may be viewed as being provided voluntarily or involuntarily.

*Note:* The Release includes a special transition provision for participants and beneficiaries who have e-mail addresses on file with the employer, plan sponsor or plan administrator at the time the fee disclosures are first required to be provided under the Final Rule (*i.e.*, May 31, 2012 for calendar-year plans). Under this special rule, the “voluntary” requirement and initial notice requirement are deemed satisfied if the plan administrator sends out an initial notice containing most of the information described above no earlier than 90 days and not later than 30 days before the date the fee disclosure information must first be provided. This notice must be in paper form unless there is evidence that the individual has had electronic interaction with the plan during the 12 months prior to the time the notice is sent.

- **Annual Notice:** The plan administrator must provide an annual notice at the beginning of each year that contains similar information to the initial notice (including the individual’s right to “opt out” of receiving electronic disclosures). The annual notice may only be sent electronically if the plan administrator has evidence that the participant or beneficiary has electronically interacted with the plan since the last annual (or initial) notice was delivered.
- **Actual Receipt:** The plan administrator must take “appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system results in actual receipt of the transmitted information.” For example, the plan administrator could use a “return receipt” function or conduct periodic reviews to confirm receipt of the disclosures.
- **Maintain Confidentiality:** The plan administrator must take appropriate and necessary steps reasonably calculated to ensure that the electronic delivery system protects the confidentiality of personal information.
- **Understandable Communications:** The notices must be written in a manner calculated to be understood by the average plan participant.

## Next Steps

Plan administrators should carefully review this interim guidance because it provides methods in addition to the DOL's electronic delivery "safe harbor" for properly delivering the upcoming fee disclosures for participant-directed plans. Plan administrators should determine how such disclosures can be delivered electronically under this guidance since the DOL may not provide definitive guidance on its general electronic delivery rules before the initial fee disclosure deadlines.

If you have any questions about the content of this publication, please contact the Pillsbury attorney with whom you regularly work or the Executive Compensation & Benefits group.

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