

## Questions E Disclosures – June 11, 2020

1. Pooled balance forward plans, it would be impossible to send the participant statements electronically. Is it ok to keep sending paper copies?
  - Paper copies are still always permitted. eDisclosure Regulations never require anyone to change from paper to electronic. Annual statements are excluded from the new eDisclosure Regulations.
2. What about annual participant notices?
  - Annual participant notices that are dictated by the IRS may be covered by these rules, but the IRS must give its affirmative approval first. We anticipate that the IRS will give this permission hopefully before the big notice season this Fall.
3. It would be helpful to provide a complete list of items that cannot be sent e-delivery and assume all others can be.
  - Slides 11, 17-18 provide a listing of those covered under the new eDisclosure Reg. Examples include automatic enrollment, safe harbor, 404a-5 fee disclosure, quarterly participant statements, QDIA notices, SPDs.
  - The old 2002 Disclosure Regulation is still applicable for use for other documents such as requests for plan documents that aren't required to be given automatically.
4. Is the SPD 'OK' or "not ok"?
  - SPD is ok to distribute using new eDisclosure Reg. It is also permitted to distribute an updated SPD as part of the annual "package" permitted under the new Reg.
5. Can you just refer them to the DOL website for a copy of the 5500?
  - The Form 5500 is not a document that needs to be given automatically. It is not covered by the new eDisclosure Reg. Any request for the Form 5500 would fall under the old 2002 Reg.
6. What about the SPD? For covered documents it could fall under both categories.
  - See Q4 above.
7. Since the paper notice needs to include the email address that will be used for the NOIA, if that email address comes back undeliverable, but we have another email address on file from a participant, can we simply switch to that 2nd email address and/or a smart phone number if one was provided instead?
  - If there is an alternative email address, you need to start over again for the Initial Notice with the new email address. Meanwhile, you need to stick to paper notices.
8. Can you confirm safe harbor notices are not covered under the new rules?
  - As noted above in Q&A-2, the IRS dictated notices have to have the blessing from the IRS before they can be distributed in accordance with the new rules. Fingers crossed this comes out shortly.
9. If a participant requests that a plan document not covered by the new rule be emailed to them does it still need to be mailed?
  - A plan document would fall under the 2002 Reg. It may be emailed to the participant if there is permission given to do so.
10. Does the "initial notification" requirement still apply if emailing direct (and not using inter/intra net)

- Yes, the initial notification must be given regardless of whether email or the internet is being used
11. Does the initial email to confirm the email address need to be responded to.
    - The initial notification must be given on paper and there is no requirement to receive confirmation back. That is one of the big changes of the new Reg compared to the 2002 Reg which requires affirmative permission.
  12. In other words what if you typed a wrong email address and the participant never received the original email?
    - The Initial Notice is mailed on paper initially. Thereafter, the NOIA can be sent electronically
  13. Can the employer continue to use paper copies if they want to?
    - Always. Use of electronic disclosure is voluntary.
  14. Is it OK to mask part of the email address for security purposes?
    - There is no way for a participant to verify that an email address is correct if they can't see it.
  15. If posting NOIA on employee website, do they specify where it has to be posted on the website?
    - The NOIA must be sent directly to participants. It doesn't get posted on the website. Just the notices get posted to the website. The NOIA must specify where the actual notice is on the website or provide a hyperlink to it.
  16. Anything that would exclude providing an SMM under the new e-disclosure rules? Can the initial notice be sent via email or does it have to be sent via paper?
    - The initial notice gets provided via paper. The SMM can be sent electronically per the new Reg
  17. Does the initial disclosure need to be on paper or can it be emailed?
    - See above responses
  18. Does the ability to opt out of electronic delivery under the new rules apply to "wired at work" employees as well?
    - Yes, even under the 2002 Reg, wired at work employees can elect out of receiving electronic notices.
  19. Who pays for the paper copy? If not the participant, can the charge be assessed to the plan at large?
    - The Plan Sponsor must provide the paper copy at NO charge to the participant. However, the paper copy of a given document must be provide free of charge only once. If the participant re-requests a previously provided document, the employer may charge for the second and subsequent copies.
  20. If combined annual notice is used 1 year, but the timing can't be met the next year, is it correct all notices can still be sent individually without regard to that 14 month timing?
    - The 14-month window is to help provide flexibility rather than a strict 12 month timing. The original due dates for the notices do not change. For example, QDIA notice must still be given no later than 30 days before the anniversary. For Summary Annual Reports, not on extension, the deadline is still the end of the 9<sup>th</sup> month of the following year (i.e. September 30 for calendar year plans).
  21. So Initial Eligibility packets cannot be under a single NOIA?

- The initial notice must be given separately via paper. The NOIA is a separate notice. And, no, you cannot provide an enrollment package in a combined package – except for the annual package discussed in the session, each notice must have its own NOIA.
22. Is a safe harbor notice includable in the combined annual notices?
- See Q2&8
23. Did you say the SH notice is a notice that may be combined (slide 17)?
- See Q2&8
24. Did the IRS ok the electronic delivery of the safe harbor notice?
- Yes, it may be electronically delivered, but that electronic delivery is based on the IRS’s rules under Treas. Reg. 1.401(a)-21
25. What about participant portals that require login credentials for posting the notices? Is that not allowed for the NOIA placement?
- NOIA must be sent directly to the participants. It is not to be posted on the website. The regulation provides that disclosures that are posted after the NOIA is provided may be placed on an “internet website or other internet or electronic-based information repository” to which the Covered Individuals have access. We assume that this would include a portal.
26. Combined Notice for initial eligibility not allowed under new Regulations? For example, a newly eligible employee needs Safe Harbor, QDIA, Participant Fee Disclosure (usually included in record keeper Enrollment Booklet), and SPD. Must each document be emailed separately (assuming not posted on intranet). If participants are wired at work, can one email with multiple attachments be sent under old regulations?
- You are permitted to have a combined NOIA for annual notices. It should also be permitted for the initial package for newly enrolled employees provide that a proper Initial Notice has been given in advance. As noted in Q2&8, the IRS needs to approve notices to go via the new Reg. Yes, the 2002 Reg would permit a combined email provided the descriptions of the attachments cover each notice being provided.
27. So we can now default, following all rules prior for initial notices and NOIA's, etc., everyone into electronic quarterly participant statements?
- Yes, if you have email addresses for everyone, this is an option.
28. I don't see the safe harbor notice listed under annual notice. Are these covered documents?
- See slide 17. Safe harbor notices and automatic enrollment notices are required by the Internal Revenue Code.
29. Ok, so if you do an amendment effective December 2020 and have a SMM, and you then go and restate for Cycle 3 as of April 1, 2021, the December 2020 SMM must stay out there. Is that what you are saying? That could be confusing.
- We don't disagree. The documents must remain for at least 1 year, so the SMM would need to remain. You might want to have a notation on the internet, however, that the 2021 SPD supersedes the 2020 SMM to help clear up the confusion.
30. Does the Plan Administrator have to send the initial notice every time the participant changes the email address?
- Language in the preamble states that the plan administrator should have sufficient procedures in place to manage updating personal email addresses and it implies that such procedures would mean that no initial notice would need to be resent based on

the new email address. That said, reissuing the initial notice would be the conservative choice and provide documentation should a challenge be raised in the future.

31. What if email is returned and can't find forwarding home address?
  - Now, you have to use the Field Assistance Bulletin 2014-01 to try to locate the participant.
32. What is the timing for distributing via the alternate address or paper if you get that bounce back?
  - There is still an obligation to get the notice to the participant timely. Once the email bounces back, a plan sponsor will need to take reasonable steps to locate and properly notify the participant. No different than mail coming back undeliverable. The regulation provides that the failure of delivery must be dealt with "promptly" and that, in absence of an alternate email address, the paper copy must be furnished "as soon as practicable."
33. Can quarterly participant notices be posted at a different location since they are confidential and will require login? While required notices are not participant specific?
  - As long as the NOIA properly identifies where the covered document is located, there is nothing to require documents to be located all in the same place.
34. Did you say an SMM posted on January 1 that was incorporated into an updated SPD posted on 4/1, has to remain on the site for a year? That will be confusing.
  - See Q29
35. What about the initial paper notice?
  - Unclear what you are asking.
36. If a participant's contact info changes (active or terminated participant) - does that mean a new paper initial notice has to go out to reflect the new contact email/cell #?
  - See Q30
37. Does the participant need to confirm the cell phone numbers collected are smart phones eligible to accept texting and are subject to any applicable texting rates?
  - There is nothing in the new Reg regarding this, but if a participant gives consent to use the smart phone, it is reasonable to assume that they have confirmed this. However, of course, if the message sent to the smart phone number is rejected, then the Plan Administrator must take the necessary steps to obtain a working address or treat the participant as if he/she had opted out of e-disclosure.
38. Could a small employer have a folder on their computer network to post notices instead of having an actual intranet website?
  - The new Reg considers 'website' to mean a broad arrange of options. It can include an electronic-based information repository.
39. Does the initial notice have to be paper? Or can be sent to the email address which will be used for notices moving forward?
  - See above
40. What about, like so many sites with disclosures, have a place where they check that they read and understood. (Intel Case)
  - Unclear what you are asking. A company intranet site is a viable location. Unfortunately, under the Intel case, it is not sure what the standard will be to prove that

the participant had “actual knowledge” of the disclosure, such that it starts the running of the statute of limitations on fiduciary breach lawsuits.

41. Was this "actual knowledge" part of 2002 too? (Intel Case)
  - The actual knowledge standard is from ERISA §413. In fact, the case dealt with a situation that preceded the new regulations.
42. Thoughts on using multiple web sites for posting documents, e.g., plan sponsor web site and record keeper web site? Or do they all have to be on one web site for access?
  - There is no requirement to have it all on one website. The NOIA has to be clear as to the location of each Covered Document.
43. When can we start using the new DOL e-disclosure Regulations?
  - Effective July 26, 2020 (60 days post publishing on 5/27/2020).
44. Is the act of opting what should be "free of charge" or do all the future paper notices need to be free of charge?
  - If the participant opts out, all paper notices must be given free of charge.
45. Should read receipts be kept for any notices that are emailed?
  - Keeping the read receipts for NOIA may demonstrate actual delivery and receipt (in case a participant claims that he/she did not get a given disclosure). However, it doesn't appear to have much use in relation to proving that the participant had actual knowledge of the provided information such that the statute of limitations period begins to run. Tracking the actual clicking on the documents sent is more important.
46. If a covered document is due shortly and the company is experiencing issues due to COVID-19, can they rely on EBSA Disaster Relief Notice 2020-01 to send the covered document electronically without a NOIA and Initial Notice?
  - Notice 2020-01 provides an extension for any notice due between March 1, 2020 and 60 days following the end of the national emergency IF the plan sponsor acts in good faith to try to get the notices distributed. Once the new Reg is in effect, a plan sponsor can use it to exercise that good faith.
47. Can notices simply be provided by email vs. being available on a website by clicking a link - thinking many smaller employers won't have the capacity to maintain a website?
  - Yes, sending the notices via email is permitted. Obviously, documents with confidential information, such as statements, shouldn't be sent via an unsecured method.
48. Can plan sponsors continue to deliver notices manually? IE...Are the new E delivery Regulations required?
  - No, paper is still perfectly fine.
49. Can a RK charge for postage when participants request paper copies and offer the free-of charge printed notices for a pick-up?
  - No, a participant must be allowed to receive paper notices completely free of charge. Plan assets as a whole can cover this expense, so if forfeitures can be used for fees, that would be appropriate.
50. Will you guys provide sample initial plan admin notices to edit?
  - The contents are explicitly provided in the new Reg. Samples may be available on ERISApedia in the future, but we are not sure.
51. Several years ago platforms stopped sending paper statements and went to email. Do these employees need to receive new initial and NOIA notices about the quarterly statement?

- If the platform is using the 2002 Regs, they can still continue to use those rules.
52. A fee disclosure sent by a provider quarterly that is available on the provider's website are plan sponsors required to send out to participant quarterly, even though they are available on the participant web page at the provider?
- Whether the plan sponsor or the provider is sending out the participant quarterly statements, they need to comply with either 2002 Reg or the new Reg.
53. To clarify - can you mask it in the notice about e-delivery?
- Unclear what you are asking
54. I understood that the initial notification that I need to send to let participants know that they will be receiving electronic documents and how – had to go out via paper. The presenters seemed to indicate that it is okay to email this initial notice. Can you clarify?
- As noted earlier, it should be sent via paper.