NEUBERGER | BERMAN

MICHAEL BARRY
President, O3 Plan Advisory Services

DOL finalizes electronic participant communications safe harbor

On May 21, 2020, the Department of Labor released a final regulation amending current disclosure rules, providing a new "notice and access" safe harbor for the use of electronic communications to satisfy required participant disclosures in retirement plans.

The new rule dramatically liberalizes DOL's electronic communication rules, which (with certain exceptions) previously required that the individual receiving the electronic communication either had access to the employer/sponsor electronic information system as an integral part of her duties (aka was "wired at work") or had affirmatively consented to electronic receipt.

Under the new rule, generally all required retirement plan-related communications (other than those provided only upon request) may be posted to a website, provided the affected individual receives a notice at his "electronic address" directing him to the website and has the right to request a paper copy or opt out of the electronic communications program. In an addition to its proposal, DOL expanded the safe harbor to include disclosure directly via email, pursuant to similar rules.

In what follows, we review the final regulation.

Which participants are covered?

Plan administrators may use new safe harbor electronic communications for any participant, beneficiary or other individual entitled to a plan communication, provided that individual has provided the administrator with an "electronic address," e.g., an email address or smartphone number. An electronic address provided by the employer to an employee is also valid if it is provided for employment-related purposes that include but are not limited to the delivery of covered documents.

If a smartphone number is used, then the plan administrator must "take steps … to distinguish landline numbers from mobile or similar numbers that enable the receipt and inspection of written messages." (Quoting the preamble to the regulation.)

What communications are covered?

The safe harbor generally covers any document or information that is required to be provided under ERISA by a retirement plan to a participant or beneficiary other than documents that are required to be provided "only upon request." Welfare plans subject to ERISA are not covered by the proposal.

The administrator must send a "notice of internet availability"

For each document that is being provided online, the administrator must send a separate, electronic "notice of internet availability" (NOIA). The NOIA generally must be furnished separately, calculated to be understood by the average plan participant, and be sent at the time the document is posted online. It must generally include:

The title: "Disclosure About Your Retirement Plan."

A statement that: "Important information about your retirement plan is now available. Please review this information."

Identification and, if identification would not reasonably convey the nature of the covered document, a brief description, of the online document.

The web address (or hyperlink) for the document.

A statement of the right to get a paper version (free of charge) and a statement of the right to opt out of electronic communications and how to do so.

"A cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document."

The administrator's or a designated representative's phone number.

The notice generally may not contain any content other than the items on the above list. It may, however, "contain a statement as to whether action by the covered individual is invited or required in response to the covered document and how to take such action, or that no action is required, provided that such statement is not inaccurate or misleading."

Annual combined notice

The administrator may send a combined NOIA for: a summary plan description; any document or information required to be furnished annually that does not require action by a particular deadline; disclosures authorized for this purpose by the Secretary of Labor or (where disclosure is required by the Internal Revenue Code) the Secretary of the Treasury.

A combined notice of internet availability must be provided annually (with a two-month "grace period").

Website standards

The ERISA-required document must be posted to the website (or "other internet or electronic-based information repository") by the date it is required to be provided under ERISA and must remain there for at least one year, or, if later, it is superseded by a subsequent version of the same communication. It must be provided in a "widely-available format or formats that are suitable to be both read online and printed" and that can be permanently retained. And it must be electronically searchable.

The administrator must also "take measures reasonably calculated to ensure that the website protects the confidentiality of personal information."

Right to paper copies or to opt out

The individual must have the right to request a (free) paper copy of any document and the right to "globally" opt out of receiving communications electronically.

In addition, the electronic communication system "must be designed to alert the administrator of a covered individual's invalid or inoperable electronic address."

Initial notification

When an administrator implements the safe harbor electronic communications program with respect to any individual, it must provide: an initial paper notice that covered documents will be provided electronically to an identified electronic address; necessary access instructions; a "cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document"; and a statement of the right (free of charge) to obtain a paper version or to opt out of electronic delivery.

Special rule for terminating employees

When an employee who is receiving safe harbor electronic communications at an electronic address "assigned by an employer" terminates, the administrator must "take measures reasonably calculated to ensure the continued accuracy and availability of such electronic address or to obtain a new electronic address that enables receipt of covered documents following the individual's severance from employment."

Electronic disclosure via email attachment

The final regulation adds a new provision allowing—in addition to disclosure via a website as described above—direct disclosure via an email (and only via an email, not, e.g., via a text to a mobile phone number). The covered document must be sent to the individual's email address no later than the date on which the document must be furnished under ERISA.

Because disclosure is being provided directly, no NOIA is required. Instead, the email must:

> Include the required document in the body of the email or as an attachment.
>
> Include a subject line: "Disclosure About Your Retirement Plan."
>
> Conform to the same identification/brief description, statement of right to paper copy and right to opt out, identification of administrator's phone number, and readability requirements that apply to website disclosure discussed above.

The other provisions applicable to website disclosure (e.g., as to format, confidentiality, and right to paper disclosure) generally apply to email disclosure.

The new rule is applicable 60 days from publication in the Federal Register (publication is scheduled for May 27, 2020).

One question raised by commenters on the proposed rule was whether the standards under the new rule could be used for disclosures required by the Internal Revenue Code. In that regard, DOL (in the preamble to the final regulation) stated: "The Treasury Department and the IRS have indicated that they intend to issue additional guidance relating to the use of electronic delivery for participant notices."

The final regulation represents a significant improvement over current rules and will permit many sponsors to upgrade, and in some cases transform, the way they communicate with their participants.

We will continue to follow this issue.

This material is provided for informational purposes only and nothing herein constitutes investment, legal, accounting or tax advice, or a recommendation to buy, sell or hold a security. Any views or opinions expressed may not reflect those of the firm as a whole. Information presented may include estimates, outlooks, projections and other "forward-looking statements." Due to a variety of factors, actual events may differ significantly from those presented. Neuberger Berman products and services may not be available in all jurisdictions or to all client types. This material is informational and educational in nature, is not individualized and is not intended to service as the primary or sole basis for any investment or tax-planning decision. Diversification does not guarantee profit or protect against loss in declining markets. Investing entails risks, including possible loss of principal. Indexes are unmanaged and are not available for direct investment. **Past performance is no guarantee of future results.**

This material is general in nature and is not directed to any category of investors and should not be regarded as individualized, a recommendation, investment advice or a suggestion to engage in or refrain from any investment-related course of action. Neuberger Berman is not providing this material in a fiduciary capacity and has a financial interest in the sale of its products and services. Investment decisions and the appropriateness of this material should be made based on an investor's individual objectives and circumstances and in consultation with his or her advisors. This material may not be used for any investment decision in respect of any U.S. private sector retirement account unless the recipient is a fiduciary that is a U.S. registered investment adviser, a U.S. registered broker-dealer, a bank regulated by the United States or any state, an insurance company licensed by more than one state to manage the assets of employee benefit plans subject to ERISA, or, if subject to Title I of ERISA, a fiduciary with at least $50 million of client assets under management and control, and in all cases financially sophisticated, capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies. This means that "retail" retirement investors are expected to engage the services of an advisor in evaluating this material for any investment decision. If your understanding is different, we ask that you inform us immediately.

Neuberger Berman Investment Advisers LLC is a registered investment adviser. The "Neuberger Berman" name and logo are registered service marks of Neuberger Berman Group LLC.

NEUBERGER | BERMAN

Neuberger Berman
1290 Avenue of the Americas
New York, NY 10104-0001

V0119 05/20 483974 ©2020 Neuberger Berman Group LLC. All rights reserved.

www.nb.com