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Re: DOL Issues New Electronic Delivery Policy for Participant Fee Disclosures

Dear Clients and Other Friends:

The Department of Labor recently issued Technical Release 2011-03 providing an interim policy on electronic delivery of participant fee disclosures under participant-directed qualified retirement plans, such as 401(k) plans.¹

Many plan sponsors and administrators have looked to electronic distribution to reduce costs and facilitate plan administration. The current electronic delivery rules, however, have proven to be confusing and burdensome.² Although the DOL is currently reviewing whether to issue new rules for electronic delivery, updated guidance will likely not be issued before new participant fee disclosures are first required to be distributed.

For calendar year plans, plan administrators must distribute initial participant fee disclosures, relating to plan information and investments, on or before May 31, 2012 and annually thereafter. Quarterly disclosures, relating to individual account and administrative expenses, for calendar year plans must be provided no later than August 14, 2012.³

What's New for Plan Administrators?

DOL Tech. Rel. 2011-03 allows plan administrators to:

- provide the quarterly fee disclosures in the same manner and at the same time as the quarterly benefit statements - including by e-mail message or via a secure, continuous access Web site, in compliance with Field Assistance Bulletin 2006-03;
- distribute the initial and annual fee disclosures electronically, provided certain conditions are satisfied (see Initial and Annual Notice summary in the chart below), including that the recipient receives proper notice of the electronic delivery process and voluntarily provides their e-mail address; and

¹ Link to DOL Technical Release 2011-03 issued on September 13, 2011: <http://www.dol.gov/ebsa/pdf/tr11-03.pdf>.

² Including the 2002 DOL regulations safe harbor, 29 CFR § 2520.104b-1, and the Treasury Regulations rules, 26 CFR § 1.401(a)-21. (Links for these resources are included in the chart accompanying this letter.)

³ For a detailed explanation of the participant fee disclosure rules, including content requirements and timing rules, please refer to our prior letters available at this link: <http://www.khblaw.com/newsletters/>

- under a **special transition rule** for the initial participant fee disclosure, a plan administrator may use e-mail addresses that are already on file to distribute notice of the electronic delivery process, provided that certain conditions are met (see Special Transition Rule summary in the chart below). Note that this is a one-time exception to the general rule for providing the initial participant fee disclosure notice.

Though DOL Tech. Rel. 2011-03 generally relies upon existing electronic delivery approaches, it establishes certain options for electronic delivery of these disclosures and adds a helpful transition rule for initial participant fee disclosures. It is important to note that this new guidance *only* applies to the participant fee disclosures and cannot be used for any other communications to participants and beneficiaries. It is also important to remember that this is interim guidance and it is anticipated that the DOL will ultimately revise electronic delivery rules.

How May Quarterly Fee Disclosures Be Provided Electronically?

Quarterly participant fee disclosures may be provided in the same manner as the quarterly benefit statements that are already being furnished to plan participants and beneficiaries. For example, if the quarterly benefit statement is provided through a secure, continuous access Web site in compliance with Field Assistance Bulletin 2006-03, then the quarterly participant fee disclosure may be provided using the same Web site.

How May Initial and Annual Disclosures Be Provided Electronically?

The initial and annual disclosures may be furnished electronically using either the 2002 DOL safe harbor rules or under new DOL Tech. Rel. 2011-03 rules. Under either approach, electronic delivery must result in “actual receipt” of the transmitted information, typically meaning that plan administrators should use return receipt functions and/or conduct periodic reviews to confirm receipt. See the chart at the end of this letter for a summary comparison of current electronic delivery guidance.

Plan administrators and service providers should carefully review these rules to determine the extent to which electronic media may be utilized to furnish the important new participant fee disclosures. Since these new disclosures are required beginning next year, review and planning should be on-going now.

Please contact us if we may be of assistance in addressing these new rules or other fee disclosure matters.

Sincerely,

Ted Rice

Holly Fistler

Summary of Electronic Delivery Rules for ERISA Retirement Plans

(See official guidance available through the links below for specifics)



Rule	2002 DOL Safe Harbor 29 CFR §2520.104b-1	Treasury Regulations 26 CFR §104(a)-21	DOL Field Assistance Bulletin DOL FAB 2006-03	DOL Technical Release DOL Tech. Rel. 2011-03
Type of Plan Materials	ERISA disclosures, including: <ul style="list-style-type: none"> ▪ SPDs, ▪ SMMs, ▪ SARs, ▪ QDRO notices, ▪ Plan investment information, ▪ Benefit statements, ▪ Plan loan notices. 	Notices to participants and beneficiaries required by the IRC, including: <ul style="list-style-type: none"> ▪ Distribution notices, consents and elections, including QJSA ▪ Safe harbor plan notices, ▪ Loan agreements, ▪ Notices to interested parties. 	Quarterly pension benefit statements.	Participant fee disclosures, including: <ul style="list-style-type: none"> ▪ Initial Fee Disclosures ▪ Annual Fee Disclosures ▪ Quarterly Fee Disclosures
Electronic Delivery Compliance Standard	Electronic documents must be delivered in a way that is “reasonably calculated to ensure actual receipt.” <i>Best practice:</i> Use e-mail read receipt, notice of undelivered e-mail and/or periodic reviews to ensure individuals actually received the disclosures.	Participants and beneficiaries must have the “effective ability to access” the electronic media. <i>Best practice:</i> Use e-mail read receipt, notice of undelivered e-mail and/or periodic reviews to ensure individuals actually received the disclosures.	Benefit statements must be “reasonably accessible to participants and beneficiaries.” May be provided under Treas. Reg. §1.401(a)-21 or through a secure, continuous access Web site.	Quarterly Fee Disclosures: May be provided with quarterly benefit statement that satisfies FAB 2006-03. Initial/Annual Fee Disclosures: May be provided under 2002 DOL Safe Harbor or under Tech. Rel. 2011-03. (Actual receipt; <i>Best practice</i> approach, at left.)
Consent to Electronic Delivery	<u>Participants with Work-Related Computer Access:</u> <ul style="list-style-type: none"> ▪ No affirmative consent necessary. ▪ Participant must have employment duties with access to employer’s electronic information system. <u>Other Participants and Beneficiaries</u> must affirmatively consent to electronic delivery.	<u>Two Alternatives:</u> 1) Participants and beneficiaries must affirmatively consent to receive electronic disclosures. 2) If participants and beneficiaries have the effective ability to access electronic media and are advised of the right to receive paper copies of disclosures.	<u>Disclosure under Treas. Reg. §1.401(a)-21:</u> Participants and beneficiaries must affirmatively consent to receive electronic disclosures. <u>Disclosure via secure Web site:</u> No affirmative consent necessary.	Quarterly Fee Disclosures: Follow the rules under FAB 2006-03. Initial/Annual Fee Disclosures: Participant and beneficiaries must: <ul style="list-style-type: none"> ▪ voluntarily provide an e-mail address, ▪ receive an Initial Notice (see below) accompanying request for e-mail address, and ▪ receive an Annual Notice thereafter. Special Transition Rule: Initial Notice may be delivered electronically <i>if</i> plan has evidence of electronic interaction between participant and plan within last 12 months <i>and</i> advance notice of such delivery is provided no earlier than 90 days or later than 30 days prior.
Notice Accompanying Request for Consent	<u>Participants with Work-Related Computer Access:</u> No electronic consent notice required. <u>Other Participants and Beneficiaries</u> must receive a statement with a request for affirmative consent, including: <ul style="list-style-type: none"> ▪ scope of consent to electronic delivery, ▪ right to withdraw consent, ▪ right to request and obtain a paper copy free of charge, and ▪ explanation of electronic delivery system. 	Participants and beneficiaries must receive a disclosure statement, including: <ul style="list-style-type: none"> ▪ explanation of right to request and obtain paper copy free of charge, ▪ right to withdraw consent, ▪ right to request and obtain a paper copy free of charge, ▪ scope of consent to electronic delivery, ▪ procedures for updating contact information for electronic delivery, and ▪ hardware/software needed to access electronic disclosures. 	<u>Disclosure under Treas. Reg. §1.401(a)-21:</u> See Treasury Regulations rules (to the left). <u>Disclosure via secure Web site:</u> Participants and beneficiaries must receive a notice which: <ul style="list-style-type: none"> ▪ explains availability of pension benefit statement, ▪ explains how to access the statement, ▪ states right to request and obtain paper copy free of charge, ▪ is written in manner to be understood by average plan participant, and ▪ is furnished in manner permitted by rules. This notice must be provided prior to the initial electronic delivery, and annually thereafter.	Quarterly Fee Disclosures: Follow FAB 2006-03 rules. Initial/Annual Fee Disclosures: Initial and Annual Notice must include (also see Special Transition Rule above): <ul style="list-style-type: none"> ▪ statement that providing an e-mail address is voluntary, ▪ identification of the participant fee disclosures that will be provided and how to access them, ▪ statement of right to request and obtain paper copy free of charge, ▪ statement of right to withdraw consent and how to exercise that right, and ▪ explanation of procedure for updating e-mail address. Notices must be understandable and confidential.
Notice Accompanying Electronic Delivery	Notice must accompany each electronic disclosure, explaining: <ul style="list-style-type: none"> ▪ significance of the document, and ▪ right to request and obtain a paper copy free of charge. 	Notice must accompany each electronic disclosure, explaining: <ul style="list-style-type: none"> ▪ significance of the document, and ▪ right to request and obtain a paper copy free of charge. 	<u>Disclosure under Treas. Reg. §1.401(a)-21:</u> See Treasury Regulations rules (to the left). <u>Disclosure via secure Web site:</u> Initial and annual notice as explained above.	Quarterly Fee Disclosures: Follow the rules under FAB 2006-03. Initial/Annual Fee Disclosures: Initial and annual notices as explained above.