



## DOL and IRS Issue Rules for the Use of Electronic Media

**WHO'S AFFECTED** These rules establish guidelines that generally affect sponsors of and participants in qualified retirement plans. The Department of Labor (DOL) rules do not apply to governmental plans, non-electing church plans or tax sheltered annuity programs that are not subject to ERISA's reporting and disclosure requirements. The IRS rules apply, as appropriate, to all qualified plans.

**BACKGROUND AND SUMMARY** On April 9, 2002, the DOL's Pension and Welfare Benefits Administration (PWBA) issued final safe harbor rules for disclosure of employee benefit plan information to participants and beneficiaries, as well as rules regarding the maintenance and retention of employee benefit plan records in electronic form. The final rules for disclosure of plan information to participants and beneficiaries using electronic media will become effective on October 9, 2002. However, the rules for the maintenance and retention of plan records will become effective with the *first day of the first plan year beginning on or after* October 9, 2002.

Previously, in February 2000, the IRS issued final regulations regarding the use of electronic media for providing certain participant notices and obtaining participant consent to certain plan distributions. These rules were effective for plan years beginning on or after January 1, 2001.

More recently, on July 19, 2002, the IRS published final regulations allowing plan sponsors to provide electronic notices to interested parties regarding determination letter applications. These rules apply to all determination letter requests made on or after January 1, 2003.

This issue of Prudential Retirement's *Pension Analyst* will address both the DOL and IRS rules.

**ACTION AND NEXT STEPS** Plan sponsors that are interested in using electronic methods for delivering required participant notices and for maintaining administrative records should review these rules.

\*Republished December 2004 to reflect Prudential Financial's acquisition of CIGNA's retirement business

## IN THIS ISSUE

- [DOL Finalizes Electronic Disclosure Rules](#)
- [Covered Participants](#)
- [Acceptable Means of Delivery](#)
- [Consenting to Electronic Receipt Outside the Workplace](#)
- [General Plan Administrator Requirements](#)
- [Electronic Maintenance and Retention of Records](#)
- [IRS Issues Final Rules on Electronic Transmission](#)
- [Notices That May be Provided Electronically](#)
- [Modified Timing Requirements](#)
- [Participant Consent Through Electronic Media](#)
- [Notices to Interested Parties](#)
- [Next Steps](#)

## DOL Finalizes Electronic Disclosure Rules

The DOL released proposed regulations in 1999, that provided safe harbor guidelines that plan administrators could follow to furnish summary plan descriptions (SPD), summaries of material modifications (SMM), and summary annual reports (SAR) through electronic media. The final rules released in April 2002, expand upon the proposed regulations to include benefit statements, investment related information required under ERISA Section 404(c), qualified domestic relations order (QDRO) notifications, participant loan information, and other documents that may be requested and examined by participants or beneficiaries. Plan administrators may follow the final *safe harbor* guidelines to ensure that they meet ERISA's general disclosure requirements. However, plan administrators are not required to comply with the safe harbor rules.

While the final regulations expand on the documents that may be provided via electronic mailing, they do not alter any other requirements that apply to the disclosure of the documents, such as to whom the disclosure should be made, or the content or timing of the disclosure.

These rules are effective October 9, 2002.

### Covered Participants

The final regulations indicate that the safe harbor rules apply to two groups of individuals. One group includes participants who work with and have direct access to the employer's electronic information system, inside and outside of the immediate work area. This group includes employees who may work from home, as well as those whose position requires travel, as long as they have ready access to the employer's system.

The second group includes those participants, beneficiaries and others who are entitled to receive disclosures under Title I of ERISA and who have *consented* to receive these documents through electronic means outside the workplace. Certain conditions need to be met before the employer can rely on using any other electronic media that is not within the control of the employer or plan sponsor. These conditions are discussed in the section below, titled [Consenting to Electronic Receipt Outside the Workplace](#).

## **Acceptable Means of Delivery**

Computer kiosks, even if located in common areas of the workplace, do not satisfy the safe harbor requirements because the DOL does not consider them to be a direct form of communication for the employee. Requiring participants to actively seek out the information regarding their rights, benefits and obligations under the plan, is not an effective means of providing timely and important information to the individual.

An employer may distribute disclosures using a company Web site that requires a password or personal identification number (PIN) to access the plan information. The DOL views a company Web site as being similar to an insert enclosed in a written publication sent to participants and beneficiaries. Other safe harbor requirements must be satisfied in order to use a Web site as a means of distribution and to ensure actual receipt of the document. The plan administrator must send a written or electronic notice to participants and beneficiaries of the significance of the document, as well as direct them to the Web site location where the document can be accessed. The document must remain available on the Web site for a reasonable period of time after notification is provided to participants and beneficiaries.

Plans may also use diskettes or CD-ROMs to provide documents to participants and beneficiaries, as long as the individual is made aware of the importance of the information (e.g., a paper notice is provided along with the software) and as long as the other safe harbor conditions are met.

If ERISA requires plan administrators to furnish documents without charge to participants and beneficiaries, then plan administrators using the safe harbor guidelines, must provide a paper copy of the document without charge. However, if ERISA allows plan administrators to charge a fee for furnishing a document, they may charge this same fee when an individual requests a paper copy of the document.

The DOL also recognizes that some of the documents that may be provided through electronic media are confidential in nature. Therefore, plan administrators must take measures to ensure that the system they use to disclose individual participant or beneficiary information protects the confidentiality of that information.

## **Consenting to Electronic Receipt Outside the Workplace**

An individual cannot consent to receive documents via electronic means outside of the workplace until the plan administrator provides a clear and conspicuous statement that contains the following information:

- Identification of the documents to which the consent applies;
- Explanation that consent may be withdrawn at any time without charge;
- Procedures for withdrawing consent or updating address information;
- Explanation of the participant's right to request and obtain a paper copy of the electronically furnished document(s);
- Indication whether the paper copy of the document(s) will be provided free of charge; and

- Identification of hardware and software required to access and retain the documents provided electronically.

A participant or beneficiary who has consented to receive documents through electronic means outside of the workplace, must provide the plan administrator with his or her e-mail or Internet address. Participants must deliver their consent (or confirmation of their consent) to the plan administrator electronically. This method of delivery will ensure compatibility of both hardware and software applications. It also serves to demonstrate that the plan administrator has taken appropriate steps to ensure that the method of delivery results in actual receipt of the documents.

Plan administrators must also provide notice to these individuals when the hardware or software needed to access and retain the document is changed. This notice must include the revised hardware or software requirements as well as the individual's right to withdraw, free of charge, consent to receive the documents via electronic measures. After receipt of this notice, individuals must either (1) reconfirm their consent to receive the documents electronically under the new hardware or software conditions, or (2) withdraw their consent.

### **General Plan Administrator Requirements**

For those individuals who receive documents through electronic means, plan administrators must take appropriate measures to ensure the actual receipt of the document occurs. This could be accomplished by use of return-receipt or undeliverable electronic mail features, or conducting periodic surveys regarding the receipt of the transmitted document(s).

The final rules also clarify that the disclosures provided in paper form versus those provided in electronic form may differ. The documents must still comply with the requirements of the style, format and content that are applicable to the specific document. Therefore, if an individual requests a paper copy after receiving the document via electronic means, the paper copy is not required to be identical to the electronic version, but both the electronic version and paper version must meet the requirements for content and style for that specific document.

Plan administrators must also notify participants and beneficiaries of the significance of the document that is being transmitted electronically. This requirement only applies where the significance of the document is not reasonably evident from the transmittal.

### **Electronic Maintenance and Retention of Records**

Along with providing safe harbor rules for the disclosure of documents to individuals, the DOL has provided guidance for using electronic media to comply with record maintenance and retention. Effective for the first day of the first plan year beginning on or after October 9, 2002, the media used must meet the following requirements:

- The system must have reasonable controls to ensure the integrity, accuracy, authenticity and reliability of the records kept in electronic form;
- The records must be maintained in a reasonable order, a safe and accessible place, and in a manner that they may be readily inspected or examined;

- The records need to be readily converted into legible and readable paper copies as may be needed to satisfy reporting and disclosure requirements or other obligations under Title I of ERISA; and
- Adequate record management practices must be established and implemented.

The electronic system may not be subject to any agreement or restriction that would jeopardize any reporting or disclosure requirement or any other obligation under Title I of ERISA. If a third party provides the electronic recordkeeping system, this does not relieve the plan sponsor of their responsibility for the maintenance and retention of records.

The DOL also has clarified that the original paper records may be discarded any time after the information has been transferred to an electronic recordkeeping system that satisfies the above requirements. This would not apply in a situation electronic records may not replace the original documents under the terms of the plan and applicable federal or state law.

## **IRS Issues Final Rules on Electronic Transmission**

In February 2000, the IRS released final regulations regarding the use of electronic media to provide certain notices and to obtain consent for certain distributions from individuals. These rules also modified the timing requirements for providing certain distribution-related notices. They are effective for plan years beginning on or after January 1, 2001.

### **Notices That May be Provided Electronically**

The final IRS rules allow plan administrators to use either written or electronic media to deliver the following notices:

- The notice of available distribution options and the right to defer distributions;
- The rollover distribution notice; and
- The voluntary tax withholding notice for distributions that are not eligible for rollover.

These notices must be provided using a system that is reasonably accessible to the participant to whom the notice is given, and is designed to give the notice in a manner no less understandable to the individual than a written paper document. The individual must also be advised of the right to receive the notice in written form without additional charge. However, the written paper notice does not have to be identical to the electronic version of the notice, but must contain the same information. Forms of electronic media that are considered acceptable methods of delivery include e-mail, a plan's Internet or intranet Web site, and automated telephone systems.

However, automated telephone systems may not be an acceptable delivery method for the rollover distribution notice due to the amount and nature of the information that must be provided. In addition, depending on the complexity of plan distribution options, automated telephone systems may not be an acceptable delivery method for the notice of available distribution options and the right to defer distributions.

## **Modified Timing Requirements**

Plan sponsors may provide participants with the full written notice of available distribution options and the right to defer distributions, as well as the rollover distribution notice more than 90 days before a participant's distribution date, if:

- The participant receives summary notices either in writing or electronically no less than 30 days and no more than 90 days before the date of distribution; and
- Upon request and without charge, the plan provides written paper copies of the full notices to the participant.

Under these rules, plan sponsors do not have to provide the full notices on a regular periodic basis, but can provide them in connection with other materials, such as the SPD. However, plan sponsors must update the full notices as necessary to reflect changes in applicable laws and regulations. The summary of the notice must set forth a summary of the principal provisions of the notice, must direct the participant to the most recently updated version of the full notice, and advise the participant that upon request a copy of the full notice will be provided without additional charge.

## **Participant Consent Through Electronic Media**

If a plan distribution is not subject to spousal consent, but does require participant consent, the plan may obtain the participant consent electronically. To do so, the system that provides the distribution option notice, as described above, must prevent anyone other than the participant from giving consent; and provide the participant reasonable opportunity to review, confirm, modify or rescind the terms of the distribution before his consent takes effect. If a plan chooses to allow participants to consent to distributions via electronic medium, the terms of the consent must be confirmed to the participant.

## **Notices to Interested Parties**

Before the IRS issues a determination letter regarding the qualification of a retirement plan, a plan sponsor must notify all interested parties that a determination application will be filed. On July 19, 2002, the IRS published final regulations allowing plan sponsors to provide these notices by any delivery method or combination of methods reasonably calculated to ensure that each interested party receives them.

Under these rules, the notices to interested parties may be provided electronically, as long as:

- The system being used gives the notice in a manner no less understandable than a written paper document; and
- At the time the notice is provided, the participant is advised that he can receive the notice in written form at no charge.

The final regulations also revise the timing requirement for delivery of these notices. Regardless of the method used to deliver the notice, it must be given no less than 10 days and not more than 24 days before the date the application for a determination is mailed. The notice is considered "given" when (1) posted at the work-site that is frequented by employees and that is ordinarily used for employer notices or (2) sent to individual in accordance with the prescribed rules.

Plan sponsors that do not have to request determination letters (e.g., they have reliance on a prototype plan sponsor's opinion letter) do not have to provide these notices. Governmental plans are also exempt from the notice requirement, even if they request determination letters.

## **Next Steps**

Plan sponsors of eligible retirement plans may want to review their current practices and determine if it would be beneficial to implement the guidelines provided by the DOL and IRS with respect to the use of electronic media. If you have questions about these rules, please contact your Prudential Retirement representative.

### **Pension Analyst by Prudential Retirement**

The Pension Analyst is published by Prudential Retirement, a Prudential Financial business, to provide clients with up-to-date information on current legislation and regulatory developments affecting qualified retirement plans. This publication is distributed with the understanding that Prudential Retirement is not rendering legal advice. Plan sponsors should consult their attorneys about the application of any law to their retirement plans. Prudential Financial is a service mark of The Prudential Insurance Company of America, Newark, NJ and its affiliates.

Editor: Mitzi Romano (860) 534-2768