QUALIFIED PENSION SERVICES, INC.
DESIGNING TODAYS RETIREMENT PLANS

Regulatory Brief: Electronic notice delivery to retirement plan participants.

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In this modern age of going “green” a trend has developed to issue legal notices in an electronic manner whenever possible. Electronic delivery is more cost effective and generally a more efficient way to communicate with plan participants.

This Regulatory Brief reviews some key legal consideration for electronic delivery under both DOL and IRS regulations.

Certain notices fall under the jurisdiction of the Department of Labor (DOL), while others are governed by the IRS. Although the rules are similar, differences exist between the DOL and IRS electronic delivery requirements. It is important to understand which rules are applicable to which notices. The chart below describes the most significant types of participant notices:

When comparing the DOL and IRS requirements, it can be more challenging to meet the DOL electronic delivery requirements with respect to worksite delivery because current employees need to be able to access the employer’s internal systems at their worksite to obtain the document and must use such system as a regular part of their job duties. In contrast, the IRS rules apparently only require that the participant have the ability to do so. As a result, plan sponsors who provide ERISA required notices electronically should review their communication processes to ensure all requirements are being met.

ERISA notices that fall under DOL delivery requirements	Treasury/IRS notices that fall under IRS delivery requirements
• Summary Plan Description (SPD) • Summary of Material Modification (SMM) • Summary Annual Report (SAR) • Sarbanes-Oxley (SOX) • Qualified Change in Investments (Fund mapping) • Qualified Default Investment Alternative (QDIA)* • Annual Participant Fee Disclosure	• Special Tax Notice (402(f)) • Eligible Automatic Contribution Arrangement (EACA) • Automatic Contribution Arrangement (ACA) • Qualified Automatic Contribution Arrangement (QACA) • Safe Harbor 401(k) • Qualified Joint and Survivor Annuity (QJSA) and Qualified Pre-retirement Survivor Annuity (QPSA) • Benefit Reduction (204(h)) • Benefit Statements*

* These notices may be sent using either the DOL or the IRS electronic delivery rules.

DOL requirements on electronic disclosures:

The DOL regulations for electronic delivery have established safe harbor rules as follows:

“Worksite” Delivery

Plan sponsors can send documents electronically to current employees at their worksite via e-mail addresses without obtaining advance consent if they satisfy the following requirements:

- The participant is able to access the documents at any location where he or she is reasonably expected to perform his or her duties as an employee. This allows electronic delivery to employees who are not physically present in the worksite on a regular basis, e.g., employees who work from home or travel frequently.
- Access to the employer’s information system is an integral part of the employee’s job responsibilities.

Participant Consent

Electronic delivery can be made to current employees who do not meet the above conditions and to other individuals (e.g., former employees, alternate payees, or beneficiaries) only if they consent to electronic delivery and provide a valid e-mail address. Additionally, before giving consent, the individual must receive a statement that:

- Identifies the types of documents to which the consent applies.
- Clarifies that the consent may be withdrawn at any time without charge.
- Describes the procedures for withdrawing consent or updating information.
- Explains the right to obtain a paper version of the electronic document (including applicable costs).
- Identifies any software or hardware requirements to access and retain the applicable documents.

If the system’s hardware or software requirements change, then additional disclosures must be provided and participants must reconsent to receive documents electronically.

The DOL has indicated that affirmative consent is necessary for nonemployees because these communications use electronic delivery systems beyond the employer’s control.

Additional DOL Requirements for Electronic Delivery

Plan sponsors must take appropriate and reasonable steps to ensure that the electronic delivery system:

- Provides notice to participants that the document is available, and apprises participants of the document’s significance.
- Results in actual receipt by participants (e.g., using return receipt or undeliverable mail notifications).
- Protects both the confidentiality of information and unauthorized access to the information.
- Satisfies any applicable style, format, and content requirements.

It also is important to note that the DOL’s regulations are safe-harbor standards only. Thus, while an employer who provides disclosures in accordance with the regulations will automatically be deemed to have satisfied the disclosure requirements, it also means that plan sponsors are not required to follow the regulations precisely in order to satisfy their disclosure obligations through electronic delivery systems. Plan sponsors who do not rely on the safe harbor for electronic distribution must take appropriate measures to ensure that the system used results in actual receipt of the documents.

Plan sponsors also can furnish communications through an intranet or corporate website provided that all the requirements for electronic delivery are met.

Plan sponsors or providers can send a paper or e-mail notification to announce a document is available, with instructions that direct the employee to its location on a website. The actual sender should ensure that plan communications are available for a reasonable period of time after the notification is delivered.

IRS requirements on electronic disclosures:

The IRS regulations provide uniform standards around electronic notice, election, and consent. This guidance covers qualified plans under section 401(a) and 403(a), section 403(b) accounts, and IRAs. Notices provided electronically must meet either the consumer consent or the alternative method.

Consumer Consent

Under the consumer consent method, a participant must affirmatively consent to delivery of the notice using an electronic medium. Consent can be made electronically or by paper, so long as the manner of consent demonstrates the participant can access the notice in the form in which it will be provided.

Before consenting to electronic delivery, the participant must be provided with a statement that includes:

- Disclosure of the participant's right to receive a paper copy and of the process for requesting one.
- Instructions for withdrawing consent.
- The scope of the consent.
- A description of the process to update contact information.
- Applicable hardware and software requirements

Alternative Method

In some cases, a plan sponsor may provide notices without obtaining the participant's advance consent if the participant is able to "effectively access" the electronic medium used to provide the notice, and is notified that he or she can request a paper copy of the notice free of charge at any time. The IRS has not prescribed specific standards to determine whether a participant can "effectively access" a medium, but distribution of IRS notices to worksite e-mail addresses of current employees who have them should satisfy the IRS standard. The IRS's electronic delivery rule is less restrictive than the DOL's because it only requires that an employee be reasonably able to access the system, not that the employee is required to do so on a regular basis as part of his or her job duties. For those without worksite e-mail addresses, it is less clear how the effective-access standard may be satisfied.

General requirements for electronic delivery:

Any electronic system used to provide notices must meet the following requirements:

- The general timing and content requirements applicable to the notice must be satisfied.
- The electronic notice must be no less understandable to the participant than the written paper version.
- It must inform the recipient of the notice's significance (e.g., including a description in the subject matter of the notice) and any instructions needed to access the notice.

We hope you find this information useful. While government regulations are not easy to understand or implement please know that QPS is here to help with operational compliance in any way we can. Feel free to contact your plan consultant with any question or concerns and we thank you for allowing us to service your retirement plan.