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# PENSION ANALYST

Important information—Plan administration and operation



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## DOL issues interim guidance on electronic disclosures to participants

### Who's affected

This guidance applies to participant-directed defined contribution plans (including 403(b) plans) that are subject to ERISA. This rule does not apply to governmental plans, church plans that do not elect to be covered by ERISA ("nonelecting church plans"), or non-ERISA 403(b) plans.

### Background and summary

On October 20, 2010, the Department of Labor (DOL) issued [final regulations](#) requiring disclosure of fees, expenses, and other plan and investment-related information to participants and beneficiaries in participant-directed defined contribution plans. This year, the DOL [delayed the effective date of the participant fee disclosure rules](#) to require that *initial disclosures* be furnished no later than May 31, 2012 for calendar-year plans.

In 2002, the DOL issued regulations that provide a safe harbor for the use of electronic media when providing disclosures required under ERISA without an employee's consent if a computer is an "integral part" of the employee's duties. However, a recipient's affirmative consent is required if the use of a computer is not an integral part of their duties.

In 2006, the DOL issued [Field Assistance Bulletin 2006-03](#) (FAB 2006-03) to provide [interim guidance](#) on the use of electronic media to provide individual benefit statements to participants and beneficiaries. FAB 2006-03 allows plan sponsors to provide benefit statements electronically by following either the [DOL's electronic media](#) rules or the [IRS rules](#) or by providing continuous access to benefit statement information through one or more secure websites, provided certain requirements are met.

The DOL has solicited comments from the public regarding the use of electronic media and is currently reviewing these comments. However, plan sponsors, service providers and employee benefits practitioners have expressed concern about the absence of guidance on the use of electronic media to comply with the participant fee disclosure requirements as the deadline approaches. As a result, the DOL has issued [Technical Release 11-03](#), which provides an interim policy for the use of electronic media to satisfy disclosure requirements under the participant fee disclosure regulations.

### Action and next steps

Plan sponsors that are interested in using electronic media for delivering the participant fee disclosures should review the guidance discussed in this publication.

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## Overview

The final participant fee disclosure rules require plan fiduciaries to ensure participants and beneficiaries are provided with certain plan-related information, as well as investment-related information.

The final rules require disclosure of three types of plan-related information: general plan information, administrative expense information, and individual expense information. This information may be included on the plan's quarterly benefit statements if timing requirements can be met.

Participants and beneficiaries must also be provided certain investment-related information in a comparative format on or before the date they can first direct their investments and at least annually thereafter. Investment-related information includes related fees and expenses and designated investment alternatives available under the plan to ensure that participants and beneficiaries are provided with sufficient information to make informed decisions regarding the management of their plan accounts.

## Disclosure of plan-related information

The DOL has now confirmed that plan-related information that is included in a pension benefit statement may be furnished in the same manner that the other information included in the pension benefit statement is provided. For example, if the benefit statement is provided through a secure continuous access website then the plan-related information included as part of the pension benefit statement may also be furnished electronically in the same manner.

## Disclosure of investment-related information

Investment-related information that is not included in a pension benefit statement may be provided using the [DOL safe harbor electronic disclosure method](#) or an [alternative email method](#) discussed below. Plan sponsors cannot disclose this information using the IRS electronic disclosure rules.

### Alternative email method

To use the alternative email method, all of the following conditions must be satisfied:

- **Voluntary provision of email address.** Participants and beneficiaries must voluntarily provide the employer, plan sponsor, or plan administrator (or its designee) with an email address. The email address must be provided in response to a request accompanied by an [Initial Notice](#), as described below.
- **Initial notice.** The initial notice must be clear and conspicuous, provided at the same time and in the same medium as the request for the email address. It must contain the following information:
  - o A statement that providing an email address for the receipt of the participant-fee disclosure information is entirely voluntary, and that as a result of providing the email address, the required disclosures will be made electronically;
  - o Identification or a brief description of the investment-related information that will be furnished electronically and how it can be accessed by participants and beneficiaries;
  - o A statement that the participant or beneficiary has the right to request and obtain, free of charge, a paper copy of any of the information provided electronically and an explanation of how to exercise that right;
  - o A statement that the participant or beneficiary has the right, at any time, to opt out of receiving the information electronically and an explanation of how to exercise that right; and
  - o An explanation of the procedure for updating the participant's or beneficiary's email address.
- **Annual notice.** Starting with the year beginning after the year that the participant or beneficiary voluntarily provided his email address as described [above](#), the plan administrator must provide an annual notice to participants and beneficiaries that satisfies the initial notice requirements. The plan administrator may furnish the annual notice:
  - o On paper; or

- o Electronically by sending it to the email address on file for the participant or beneficiary if there is evidence that the individual interacted electronically with the plan after the date the annual notice was provided. Examples of electronic interaction include, but are not limited to: updating, resubmitting, or confirming his or her email address to the plan; sending an electronic message to the plan; logging onto a secure continuous access website housing plan information; or the receipt and opening of an electronic message sent by the plan to the participant or beneficiary.
- Delivery. The plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the delivery system results in the actual receipt of transmitted information (e.g., using return receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of transmitted information, etc.)
- Confidentiality. The plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the delivery system protects the confidentiality of personal information.
- Calculated to be understood. Notices must be written in a manner calculated to be understood by the average plan participant.

## Special transition provision

This new guidance provides a transition rule for participant and beneficiary email addresses currently on file with the employer, plan sponsor or plan administrator (or its designee). To qualify under the transition rule, the plan administrator must provide participants and beneficiaries with a notice containing the information required in the [initial notice](#) 30 to 90 days before the date the initial participant fee disclosures are provided. This notice may be provided:

- On paper; or
- Electronically by sending it to an email address on file for a participant or beneficiary if there is evidence of [electronic interaction](#) with the plan as described above during the previous 12-month period.

However, this transition rule is not available for email addresses established or assigned by the employer, plan sponsor, or its designee unless there is evidence that such email address was used by the participant or beneficiary for plan purposes during the 12-month period preceding the date the [initial notice](#) is furnished. Examples include the participant or beneficiary:

- Sending an electronic message to the plan from the email address;
- Receiving and opening an electronic message sent by the plan to the email address; or
- Logging onto a secure continuous access website housing plan information, using the email address as the username.

## Application of this guidance

This Technical Release establishes a temporary enforcement policy until the DOL issues further guidance regarding electronic delivery methods. The DOL has indicated that it will not take any enforcement actions against a plan administrator who complies with the conditions described in Technical Release 11-03. These special rules apply only to participant-level fee disclosures.

## Next steps

Plan administrators should review this guidance as they develop procedures for complying with the participant fee disclosure requirements. They may want to review their current practices and determine if it would be beneficial to implement the interim guidance provided by the DOL with respect to the use of electronic media in the delivery of participant fee disclosures.

### Pension Analyst by Prudential Retirement

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