**Strengthening Retirement Security in America**

Executive Order 13847 (August 31, 2018)

Reviewing the Current Rules for Electronic Delivery of Required Plan Notices

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**Executive Order 13847**

Section 2(c):

*Improving the Effectiveness of and Reducing the Cost of Furnishing Required Notices and Disclosures.* Within 1 year of the date of this order, the Secretary of Labor shall, in consultation with the Secretary of the Treasury, complete a review of actions that could be taken through regulation or guidance, or both, to make retirement plan disclosures required under ERISA and the Internal Revenue Code of 1986 more understandable and useful . . . , while also reducing the costs and burdens they impose on employers and other plan fiduciaries responsible for their production and distribution. *This review shall include an exploration of the potential for broader use of electronic delivery as a way to improve the effectiveness of disclosures and to reduce their associated costs and burdens.* . . .
Electronic Delivery/E-Disclosure Rules

The Department of Labor and IRS have separate sets of rules:

- Department of Labor - 29 C.F.R. § 2520.104b-1(c)
  - Special “secure continuous access website” rules apply to pension benefit statements and participant 404a-5 notices (See DOL Technical Release 2011-03R and FAB 2006-03)
- Internal Revenue Service/Treasury - 26 C.F.R. § 1.401(a)-21

*Other rules may apply depending on the type of disclosure (e.g., SEC prospectus rules for retirement plans offering employer securities)*

Labor Department E-Delivery

General Rule. An administrator satisfies ERISA's disclosure rules using electronic media if the administrator:

- Takes steps to ensure the electronic method (i) results in actual receipt and (ii) protects confidential personal information;
- Prepares the electronic documents consistent with the style, format and content requirements for paper versions;
- Upon electronic delivery, notifies the individual of both (i) the significance of the electronic document, if not evident, and (ii) the right to receive a paper copy; and
- Furnishes the individual with a paper copy upon request.
Labor Department E-Delivery

Electronic Disclosure Eligibility. These individuals may receive electronic disclosures:

1. **Participants** who satisfy both of the following:
   - Can effectively access documents at any location where they are reasonably expected to perform duties as employees; and
   - Have access to the employer’s electronic information system as an integral part of their duties;

2. **All other individuals** entitled to the required documents who:
   - Affirmatively consent (electronically or otherwise) to receiving electronic disclosures;
   - Affirmatively consent (or confirm consent electronically) in a way that reasonably demonstrates an ability to access electronic documents;
   - Provide an email address;
   - Before consenting, receive a statement explaining (i) the type of electronic documents relevant to the consent; (ii) that consent may be withdrawn at any time without charge; (iii) the procedures for withdrawing consent and updating contact information; (iv) the right to request a paper copy and any related changes; and (v) any hardware or software ("system") requirements; and
   - To the extent applicable (when subsequent changes to system requirements create a material risk to an individual’s access to electronic documents), (i) receive notice of any revised system requirements and notice of the right to withdraw consent and (ii) reconfirm consent to receive electronic notices.
IRS/Treasury E-Delivery

General Rule. Electronic notices must be written in plain English and satisfy either the

• consumer consent requirements; or
• consumer consent exemption.

Consumer Consent. The consumer consent requirements are satisfied if:

• The recipient affirmatively consents to electronic delivery (i) electronically, in a manner showing an ability to access electronic documents or (ii) in another manner that requires electronically-confirmed consent showing an ability to access electronic documents;
  • “Recipient” includes any individual who must receive plan notices
• The recipient receives a statement explaining the (i) right to request a paper copy; (ii) right to withdraw consent; (iii) scope of the consent; (iv) procedure for updating contact information; and (iv) any hardware or software (“system”) requirements; and
• To the extent applicable (when subsequent changes to system requirements create a material risk to the recipient’s access to electronic documents), the recipient (i) receives notice of any revised system requirements and notice of the right to withdraw consent and (ii) reconfirms consent to receive electronic notices.
IRS/Treasury E-Delivery

Consumer Consent Exemption. The consumer consent exemption is available if the recipient:

• Has the effective ability to access electronic notices; and

• Is advised (at the time of delivery of the electronic notice) of the right to receive a paper copy at no charge upon request.

Practical Considerations

• What is a compliant program under the current e-delivery rules?
• Must administrators satisfy both sets of rules?
• How “effective” are the current e-delivery rules?
• Will the company intranet system now be sufficient in light of the Order?
• Will an employee’s work email address suffice in all instances?
• What about employees without access to a computer workstation?
• What about employees who have access to computers at work, but don’t use computers as part of their job duties?
• What obligations are owed to inactive employees on leave?
• Will e-delivery become the default delivery mechanism for terminated participants, QDRO participants, and other beneficiaries?