

Expanded Use of Electronic Technologies for Plan Disclosures, Administration & Recordkeeping

By Mindy R. Leeds

Several years ago, the Department of Labor (DOL) recognized the everyday use of computers by individuals and business when it issued a proposed regulation allowing plans subject to the disclosure requirements of The Employee Retirement Income Security Act of 1974, as amended (ERISA) to use electronic means to deliver some of them. In April 2002, the DOL issued final regulations expanding the use of electronic technologies for plan disclosures, administration and recordkeeping that apply to ERISA governed health and welfare benefit plans and retirement plans. According to the DOL, wider use of delivering required disclosures electronically will result in cost savings (approximately \$74 million in the first year alone) and improve the timeliness, quality and accessibility of this information by participants and beneficiaries. Like the proposed regulation, the final regulation governing electronic plan disclosures provides a safe harbor. Compliance with the safe harbor means that the method employed by the plan administrator will result in the DOL (and a court) determining that the method used is reasonably calculated to ensure actual receipt of the disclosure document(s). The following is a brief overview of these regulations, with an emphasis on health and welfare benefit plan administration.

Legally Required Disclosures Through Electronic Means

Under the final disclosure regulation a greater number of legally required disclosures may be made electronically. The proposed regulation limited electronic disclosure to summary plan descriptions (SPD), summary of material modifications (SMM) and summary annual reports (SAR). The final regulation expands the types of disclosures to include all disclosures required by Title I of ERISA. In addition to SPD, SMM and SAR, Title I disclosures include individual benefit statements, COBRA notices, notices required in connection with qualified domestic relations orders and qualified medical child support orders, and HIPAA required certificates of creditable coverage and related disclosures. Also included are documents and information required to be provided

to plan participants and beneficiaries upon written request, such as the latest annual report, the plan's trust agreement, any applicable collective bargaining agreement, any plan related contract and any other documents under which the plan is established or operated.

Notification of benefit claims determinations may be made electronically, provided measures are taken to ensure confidentiality of the information. The types of safeguards mentioned by the DOL include the use of PINs and passwords, although the DOL did not express its view on their adequacy. The DOL assumes that plans will also provide notices of special enrollment rights and preexisting condition exclusions electronically.

With respect to health and welfare benefit plans, there continues to be an increased ability to administer them without requiring paper. For example, open enrollments can be conducted electronically (e.g., computer or telephone) and claim forms and beneficiary designations may be completed and submitted electronically using an electronic signature. The electronic delivery system must meet certain confidentiality requirements contained in the final disclosure regulation, as well as the confidentiality and privacy provisions contained in the Electronic Signatures in Global and National Commerce Act (the E-Sign Act)(3), the Health and Human Services Health Care Financial Administration uniform standards (4), and other applicable laws.

Both Employees and Non-Employees May Receive Disclosures Electronically: Consent Required

The final disclosure regulation permits electronic disclosures to be made to employees and non-employees alike. This is the case even if the non-employee does not have access to the employer's computer location. Under the final regulation, electronic disclosure to employees is permitted only if the employee has ready access to the employer's computer system at

a location where the employee is reasonably expected to perform his or her duties and such access is an integral part of the employee's duties. There is no requirement that access be limited to the employer's premises, however. Access through a home office or while traveling satisfies this requirement. The final regulation precludes an employer from satisfying the accessibility requirement by providing employee access through a kiosk or a computer in a common area.

With respect to employees not described above and non-employees (collectively referred to below as "non-employees"), electronic disclosure is permitted even if there is no access to the employer's computer system, provided the non-employee affirmatively consents to receive plan related documents electronically. Prior to giving consent, the non-employee must receive a statement explaining the electronic delivery system, include the hardware and software requirements needed to access the electronic documents. The final disclosure regulation safe harbor requirements reflect the consumer disclosure and consent provisions of the E-Sign Act. No consent is required when the plan administrator provides the information in a CD, DVD or similar media that are not dependent on electronic transmission.

In addition to providing consent, the non-employee must provide an Internet or similar electronic address to which the documents are to be sent. Further, when the plan documents are provided through the Internet or other electronic communication network, the non-employee's consent or confirmation of consent must be done electronically. Electronic confirmation will demonstrate to the plan administrator the non-employee's ability to access the information. The DOL believes that an electronic confirmation will also document compatibility of the plan's delivery system with that of the non-employee. Electronic confirmation will also provide proof that the plan administrator has taken appropriate and necessary measures to ensure that the electronic delivery system results in actual receipt of the transmitted information.

Changes in the hardware or software needed to access electronically transmitted documents must be provided to non-employees in a written statement. This statement must also inform the non-employee of his or her right to withdraw his or her consent to receive plan related documents electronically with a charge. After receipt of the change notice, the non-employee must once again consent to receive documents electronically. The final regulation does not specify how early the change notice is required to be made, which means plan administrators will have to determine how much time will be needed before transmission to notify affected recipients and obtain their consent.

Plan administrators should establish procedures to ensure that consent withdrawals are processed timely and paper copies of electronically disclosure materials are mailed in a timely manner. Similarly, plan administrators should establish a record retention system whereby employee and non-employee notices, consents, mailing lists and similar information is captured and maintained. As more fully discussed below, these records may be maintained electronically.

No Requirement That Electronic Transmission Be Reduced To Paper

The final disclosure regulation has deleted the requirement that participants be able to print, in hard copy, documents received electronically. Instead, participants must be given the right to request and obtain a paper version. The final regulation recognizes that plans may want to use interactive technologies, multimedia components and hyperlinks, which normally preclude the production of an exact paper copy. In this instance, the electronic and paper versions may differ, provided each type satisfies the style, format and content requirements that apply to that type of document, when viewed independently. A reasonable charge may be imposed for a paper copy if the plan could otherwise charge for copying.

Notice of Electronic Transmission

Plan administrators that deliver documents electronically must also provide

notices informing employees and non-employees of the importance of the electronically transmitted document. Under the final disclosure regulation, this notice should be provided when the document is furnished electronically. The notice must be designed to alert the recipient of the electronic transmission and its importance, unless the significance of the document is otherwise evident as transmitted. For example, a document contained in an attachment to an e-mail may require a notice of what the document is and a statement that it contains important plan information. Under the final regulation, the notice may be included with other plan or plan sponsor information, but a general notice provided periodically does not meet this safe harbor requirement.

Recordkeeping Requirements

The final recordkeeping regulation requires that electronic recordkeeping systems contain controls designed to ensure the integrity, accuracy, authenticity and reliability of the records being kept. The electronic records must be readily available for inspection and examination. The final regulation requires that these electronic records exhibit a high degree of legibility and readability when displayed on a video display terminal. Likewise, they must be readily convertible into legible and readable paper copy. Under the final regulation, "legibility" means that an observer is able to identify all letters and numerals positively and quickly. The final regulation defines "readability" as meaning that the observer is able to recognize a group of letters or numerals as words or complete numbers.

Once paper records are transferred to an electronic recordkeeping system that complies with the final recordkeeping regulation, the original paper records may be destroyed. Destruction of original records is not permitted if the electronic record does not constitute a duplicate or substitute record under the terms of the plan or any applicable federal or state law.

A plan administrator or plan sponsor wishing to maintain records electronically must establish and implement adequate record management practices. For

example, there should be a system for labeling electronic record management practices. The electronic records should be stored in a secure environment and backup copies should be created, maintained and stored in an off-site location. There should be periodic checks of the records to ensure that they remain readily accessible. Where necessary, the software or hardware needed to access these records should also be maintained, such as when the plan administrator changes computer operating systems or software upgrades prevent the retrieval of older records.

A plan administrator should adopt a written procedure governing records and record retention, irrespective of the form in which the record is maintained. A records retention policy should specify which records must be kept in paper form and those that can be maintained electronically. The policy should also specify the length of time a record will be kept, where it will be stored, the method and timing of its destruction, and who is responsible for ensuring compliance with the policy. It may be possible for a plan administrator to modify existing record retention policies governing paper records to reflect policies for electronic records.

The electronic recordkeeping system cannot be subject to any agreement or restriction that, directly or indirectly, compromises a person's ability to comply with any ERISA reporting or disclosure requirement. Likewise, the legal duty to maintain records in compliance with ERISA cannot be delegated or contracted away to a third party responsible for the electronic recordkeeping system. If the DOL initiates an investigation, the DOL may require that the person being investigated provide the equipment and resources needed to perform the inspection, examination and conversion of electronic records into legible and readable paper copy.

Effective Date

The final regulation on electronic disclosures is generally effective, for all plans, as of October 9, 2002. The final

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toward advancing and integrating the profession worldwide. And we will continue to promote enhanced corporate governance, more definitive guidelines for world-class internal audit practices, stronger systems of internal control, more accurate and timely reporting structures, better coordinated internal and external audit services, and more effective management.

PROCESS: On an organization-wide basis, respond to change in positive and productive ways to better meet the needs of our members worldwide

Preparedness is critical. Both The IIA and internal audit practitioners all over the world must be poised to address the myriad changes that introduce new concerns and challenges on an almost daily basis. The IIA will examine the ways in which it serves its members, the products and services it offers, and the delivery methods it uses to ensure timeliness, responsiveness, and alignment with the demands of today's ever-evolving global business environment.

One thing is crystal clear: Our work is cut out for us. And although we've come a long way since our organization was established in 1941, there is much yet to be done. Today's profession is quite different from internal auditing of the '40s, and it continually redefines itself. Furthermore, depending on the corporate culture and the tone at the top of the organization within which it is practiced, a given internal audit function might bear little resemblance to - and pursue a diverse set of goals from those of - its neighbor.

What does not change is also clear: The ongoing purpose of internal auditing is to help management meet its goals and objectives. The IIA is committed to supporting auditors everywhere in being on purpose. And whether we are pursuing initiatives such as the enhancement of corporate governance, or working strategically toward our worldwide directives, we do what we do in support of our profession and its dedicated practitioners.

I appreciate the opportunity to share these thoughts with you and all involved in your industry. It is my belief that together, we can make the most of the abundant opportunities on the horizon. Let us join forces for a better tomorrow, recommitting ourselves to ensuring high standards, ethics, and integrity; competent practices and effective processes; to quality assurance, legal and regulatory compliance, and financial and reporting transparency; to exemplary governance and oversight; and, to satisfied stakeholders from whom we earn the highest level of trust. ■

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regulation of electronic recordkeeping is effective on the first day of the plan year beginning after October 9, 2002.

Conclusion

The greater use of computers can increase the timeliness and effectiveness of plan related communications, while reducing the costs and burdens of providing plan information to employees and non-employees. Likewise, the use of computers and electronic media can result in significant cost savings for plan sponsors and plan administrators. The DOL, by expanding the types of documents permitted to be provided and maintained electronically, is recognizing these benefits and encouraging the greater use of these technologies. ■

Notes:

- 1) Prop. Reg. 2520.104b-1(c)
- 2) Reg. 2520.104b-1 and Reg. 2520.107-1. This discussion is not intended to be a legal opinion. Any questions concerning ERISA or the applicability of these regulations should be referred to a qualified benefits attorney.
- 3) Pub. L. 106-229, 114 Stat. 464 (2000), codified at 15 U.S.C. 7001 et. seq.
- 4) 65 FR 50311 (8/17/2000)

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Leider On Fulfillment

There are three hungers that people are trying to feed throughout their lives. The first is to connect deeply with the creative spirit of life. Thesecond is to know and express your gifts and talents. The third hunger is to know that our lives matter. Fulfillment comes from feeding these three hungers.

Richard Leider, founding partner,
The Inventure Group