

# Voya Alert!

May 29, 2020

## **DOL Releases Final Electronic Delivery Regulations; IRS Releases Additional COVID-19 Relief**

### **DOL Final Electronic Delivery Regulations**

On May 21, 2020 the Department of Labor (DOL) released final electronic delivery regulations. These regulations are in addition to the existing regulations and provide two new optional safe harbors for furnishing required documents electronically. The final rule supersedes DOL sub-regulatory guidance to the extent that such guidance provided alternate means for providing ERISA documents electronically (for example DOL Field Assistance Bulletins and other guidance around electronic delivery of employee benefit statements, QDIA notices and participant fee and investment disclosures).

**Effective date** – The final regulations become effective July 27, 2020, however they may be relied upon before that date and the DOL will take no enforcement action. Further, the regulation includes a transition rule permitting plan sponsors to rely on the electronic delivery guidance in FAB 2006-03 and 2008-03 for 18 months after the effective date of these new regulations.

### **Retirement Plans Covered by the Final Rule**

The final regulations apply to “employee benefit pension plans” subject to Title I of ERISA. A retirement plan is an employee benefit pension plan subject to ERISA unless it meets one of the following exceptions:

- A 401(a), 401(k), 403(b) or 457(b) plan of a governmental employer (including a public school);
- A top hat 457(b) plan of a nonprofit organization;
- A 401(a), 401(k), and 403(b) plans of a church or church-related entity unless the plan administrator has irrevocably elected into ERISA for that plan;
- A 403(b) plan of nongovernmental/non-church 501(c)(3) organization that meet the non-ERISA regulatory safe harbor rules; and
- IRAs that do not have employer contributions or employer active involvement.

### **Covered Individuals Eligible for Electronic Delivery**

Electronic delivery under the DOL final regulations is available to “covered individuals” – meaning a plan participant or (if applicable) to the alternate payee or beneficiary maintaining an account under the plan. In order to be eligible for electronic delivery:

- A covered individual must provide the employer, plan sponsor or administrator (or designee of any of these) with an electronic address for receipt of a written notice of internet availability or an email. For the Notice and Access Safe Harbor, this includes individuals who provide an email address or smartphone number and for the Direct Email Safe Harbor, this is only available for individuals who provide an email address.
- This condition is satisfied if an employer provides the employee with an electronic address for employment-related purposes that include, but are not limited to, the delivery of the covered documents. Therefore employees cannot provide an electronic address solely for the purpose of delivering the covered document under this new safe harbor.

### **The two new optional safe harbors:**

**Safe Harbor Option 1 - Notice and access safe harbor** – This safe harbor permits the plan administrator to furnish the required documents by making them available online and providing participants and beneficiaries with a notice of internet availability (NOIA).

The NOIA:

- Must be sent to an electronic address provided by a covered individual or if provided by the employer, for employment related purposes, that include but are not limited to delivery of covered documents. The NOIA may not be furnished by paper copy.

- The NOIA must be sent when each covered document is posted on the website (there is an exception for a combined NOIA as discussed below). The timing for furnishing required documents under ERISA or DOL regulations is not changed.
- The NOIA may be combined for the documents listed below on an annual basis:
  - A summary plan description;
  - Documents or information that must be provided annually under ERISA such as the Summary Annual Report, Annual Funding notice, QDIA notice, annual pension benefit statement and annual investment-related information. However, the quarterly benefit statement may not be included in the consolidated NOIA.
  - Any other covered document authorized in writing by the Secretary of Labor; and
  - Any applicable notice required by the Internal Revenue Code if authorized in writing by the Secretary of the Treasury.

Furnishing the NOIA once each year for the documents listed above does not change the timing of when these documents must be posted online. Each document must still be posted by the deadline required in the related regulations or guidance for that document. The combined NOIA must be provided at least once in each 14 month period.

- The NOIA must include the information listed below:
  - The following prominent Title: “Disclosure About Your Retirement Plan.” or similar title.
  - The following statement: “Important information about your retirement plan is now available. Please review this information.”
  - Identification of the covered document by name and a brief description of the document if the name of the document does not reasonably convey the nature of the document.
  - Provide the website address or a hyperlink to the address where the covered document is posted.
  - Explains the right to a paper copy of the document free of charge and instructions on how to obtain it.
  - Explains the right to opt out of electronic delivery free of charge and to receive a paper copy instead and instructions on how to make this change.
  - A statement indicating that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of that document.
  - The telephone number of the plan administrator or other designated plan representative.

The NOIA is permitted but not required to contain a statement as to whether or not any action is required by the covered individual with regard to the covered document as long as the statement is not inaccurate or misleading.

The DOL has decided not to provide a model notice.

Additionally the NOIA must:

- Contain only the required content listed above
- Be furnished separately from any other documents or disclosures
- Be written in a matter calculated to be understood by the average plan participant

**The internet website requirements** – The regulations clarify that a website is an internet website or other internet or electronic based information repository such as a mobile application where covered individuals have been provided reasonable access. The requirements listed below must be met.

- Covered documents must:
  - Remain available on the website for at least one year, or if later, until the document is superseded by a subsequent version (examples are included in the regulations).
  - Documents must be presented in a manner calculated to be understood by the average plan participant;
  - Must be in a widely available format that can be searched electronically, read online, printed clearly on paper and retained in an electronic format; and
- The participant’s personal information must be stored in a manner that is reasonably calculated to ensure confidentiality.
- Relief is provided for brief interruptions of website service.

**Initial one-time paper notice** – Prior to sending an NOIA, a plan must furnish covered individuals with an initial

notification on paper that the covered documents will be provided electronically before the new Notice and Access Safe Harbor may be used. The one-time paper notice may be distributed with other materials and must include the following content:

- The electronic address that will be used for the individual;
- Instructions on how to access the covered documents;
- The following statements:
  - The covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document;
  - The individual has the right to request and obtain a paper version of a covered document, free of charge, and an explanation of how to exercise this right; and
  - The individual has the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right.

**Plan Administrator must monitor for invalid addresses** – The procedure for furnishing the NOIA must include a method that notifies the plan administrator that the participant’s electronic address is no longer valid such as an “undeliverable” notification.

- Upon receipt of an “undeliverable” notification the plan administrator must take immediate steps to solve the problem such as using a secondary electronic address provided by the individual. If the NOIA cannot be sent electronically then the individual must be treated as having elected to receive the document in paper form and the plan administrator must send the paper document to the individual as soon as reasonably possible.
- Further, for participants that terminate from employment the plan administrator must insure that an electronic address that was provided by the plan administrator continues to be accurate and available to the participant or must insure that a new electronic address is provided by the participant. The plan administrator is not responsible for verification of an electronic address provided by the participant.

**Paper copy** – If requested by the participant the plan administrator must furnish a paper copy of the covered document free of charge. Covered individuals must have the right to opt out of receiving any required documents electronically. However, the plan administrator is not required to permit the covered individual to choose only certain documents to receive electronically. The plan administrator must develop procedures for dealing with the election of paper versus electronic delivery.


**Safe Harbor Option 2 - Direct Email Safe Harbor** – Safeguards are generally the same as for the Notice and Access safe harbor, (e.g., participants must be given the right to opt out and given the right to request paper copies). Also, although a NOIA is not required for this option since it is a direct email to the individual, many of the NOIA requirements outlined above for the Notice and Access Safe Harbor option remain the same for the content and format of the email sent to participants

**Covered documents** – The new safe harbors may be used to furnish any document with respect to a pension or retirement plan as required by Title I of ERISA to a covered individual, with the exception of documents that must be furnished only upon request. The plan administrator may choose which documents to furnish electronically.

**Potential Prospective Guidance from the Internal Revenue Service (IRS)** -- These regulations do not apply documents required to be furnished under the Internal Revenue Code. However, the Treasury Department and IRS have indicated that they intend to issue additional guidance regarding the use of electronic delivery for participant notices.

### **Internal Revenue Service Notice 2020-35: Additional COVID-19 Deadline Relief**

In Notice 2020-35, released on May 28, 2020, the IRS provided additional deadline relief regarding employment taxes, employee benefits, and exempt organizations. This Notice not only extends certain deadlines imposed by the Internal Revenue Code (Code), but also states that the relief applies for purposes of ERISA in the case of any extended Code deadlines that have parallel provisions in ERISA.



The following are some of the key highlights of Notice 2020-35

- Form 5498 deadline for filing with IRS and providing a copy to IRA owners has been extended to August 31, 2020. Penalties for failure to file by the extended deadline will begin to accrue by September 1 (Notice 2020-23 had previously extended the deadline to July 15, 2020).
- The following deadlines have been extended to July 15, 2020:
  - Implementing VCP Corrections pursuant to a Compliance Statement sent by the IRS to a Sponsor.
  - Form 5330, return of Excise taxes related to Employee Benefit Plans
  - Deadline for filing for a Minimum Funding Waiver in the event of a business hardship under Code section 412 for a pension plan other than a Multiple Employer Plan.
  - Certain plan funding deadlines for Multiemployer defined benefit pension plans.
  - The deadline for requesting approval of a substitute mortality table in accordance with Code section 430(h)(3)(C).
- Pre-approved defined benefit plan adoption deadline under the second 6 year remedial amendment period has been extended until July 31, 2020.

Voya continues to monitor these and all regulatory developments impacting retirement plans.

This material has been provided for educational purposes only for sponsors and prospective sponsors. This material was created to provide accurate and reliable information on the subjects covered. It is not intended to provide specific legal, tax or other professional advice. The services of an appropriate professional should be sought regarding your individual situation.

IRS Circular 230 Disclosure: Any tax advice contained in this document (including any attachments) was not intended by the author of this document to be used, and cannot be used by the audience or any other person, for the purpose of avoiding any Internal Revenue Code penalties that may be imposed on such person. Any tax advice contained in this document was not intended by the author of this document to be used or referred to, and cannot be used or referred to, in promoting, marketing, or recommending the transaction(s) or matter(s) addressed herein. (5/2020)