

**A GUIDE FOR PLAN SPONSORS OF 401(K) AND OTHER PARTICIPANT-DIRECTED RETIREMENT PLANS**

# ELECTRONIC DELIVERY OF PARTICIPANT DISCLOSURE MATERIALS

**EXECUTIVE SUMMARY**

Employees and other participants in 401(k) and similar retirement plans must automatically receive information about the plan on a regular basis under the federal pension law — called the Employee Retirement Income Security Act of 1974 or “ERISA.” This right to receive plan information is one of the key protections provided by ERISA to plan participants, but delivering all of the required information can be time-consuming and expensive.

Using e-mail and other electronic methods for delivering required plan information may simplify the disclosure process, provide more reliable information delivery, and possibly reduce plan administration costs over time.

The U.S. Department of Labor (DOL) and the Internal Revenue Service (IRS) issued a series of rules and interpretations around using e-mail and other electronic disclosure methods.

**These include:**

- DOL Electronic Disclosure Safe Harbor
- DOL Interpretive and Technical Guidance
- IRS Media Disclosure Guidance

**This guide is intended to:**

- Provide an overview of relevant electronic delivery rules and interpretations.
- Describe the conditions under which e-mail and other electronic methods for delivering information to plan participants will meet current standards.
- Assist plan sponsors and other fiduciaries who are considering whether to adopt e-mail and other electronic disclosure methods for their plans.
- Discuss how the Principal Financial Group® may be able to support a decision to use electronic disclosure methods for some or all of a plan’s participants.

This information is designed to help you, as a plan sponsor or plan fiduciary, make informed choices about using electronic methods to provide information to your plan’s participants.<sup>1</sup>

**ELECTRONIC DELIVERY OF PLAN INFORMATION IS NOT “ALL OR NOTHING.”**

You might elect to use e-mail to deliver plan information to employees with computer access at work and participants who have affirmatively agreed to receive plan information to an e-mail address. You may still send information by first class mail to those employees who do not have regular computer access at work, and to retirees, alternate payees and beneficiaries. In addition, some information can be posted to a continuously available website after notice. Most plans find that even limited use of electronic delivery helps reduce plan costs.

<sup>1</sup>Information in this paper is accurate as of the date this paper was published. Please note that the rules governing electronic delivery of plan information evolve, and therefore, changes in rules and interpretations issued by the DOL and/or the IRS may alter the information in this paper. As always, The Principal® seeks to keep you informed about important changes in the regulations that affect your plan through direct communication with plan sponsors and the Employer login at principal.com.

## Your Role in Providing PLAN DISCLOSURE INFORMATION TO PARTICIPANTS

Under ERISA, any person responsible for retirement plan management or administrative matters may act as a “fiduciary,” including a plan’s sponsoring employer, plan trustees, or members of a plan committee. Generally, all retirement plans must name at least one fiduciary to have overall responsibility for plan administrative activities, called the “plan administrator.” The responsibilities of the plan administrator include providing required plan information to plan participants, such as benefit statements and information about plan fees and investment information. (See page 7 for a list of disclosure requirements.)

The DOL has established a general standard for delivering plan information to participants. A plan administrator must use measures “reasonably calculated to ensure actual receipt of the material.”<sup>2</sup>

**Examples of such methods include:**

- First class mail,
- Other classes of mail if return and forwarding postage is guaranteed and address correction is requested, and
- In-hand delivery at an employee’s worksite.

Merely making a disclosure document available or posting it on a bulletin board does not satisfy this general standard.

The DOL and IRS have issued a series of rules and interpretations that explain when e-mail or other electronic disclosure methods<sup>3</sup> also satisfy the “reasonably calculated to ensure receipt” standard.

**These include:**

- DOL “Electronic Disclosure Safe Harbor” that allows electronic disclosure by the “Wired at Work” and “Affirmative Consent” methods;
- DOL Interpretive and Technical Guidance, which provide for use of “Continuous Access Website” and “Assumed Consent” methods; and
- IRS Media Disclosure Guidance allowing electronic disclosure under a “General Method” and an “Alternative Method”

**IN GENERAL,** the Wired at Work and Affirmative Consent methods are allowed for all types of plan information while the other methods are allowed for only some types of information.

<sup>2</sup>29 CFR 2520.104b-1. This paper only provides a general summary of ERISA’s rules for delivering required information to plan participants. Please refer to the regulations for specific information on how to deliver ERISA disclosures as paper documents.

<sup>3</sup>29 CFR 2520.104b-1(c) (April 9, 2002) and 26 CFR 1.410(a)-21 (Oct. 20, 2006).

# DOL ELECTRONIC DISCLOSURE GUIDANCE

## SAFE HARBOR

A Safe Harbor<sup>4</sup> provides guidelines for complying with a legal requirement — such as the requirement to deliver information by a method “reasonably calculated to ensure receipt.” Under the Electronic Disclosure Safe Harbor, the DOL states that as long as a plan administrator takes the steps required in the Safe Harbor, a notice or other disclosure document sent by e-mail or other electronic means will be considered to have been delivered, as if the information was sent by first class mail. Plan administrators may rely on the Electronic Disclosure Safe Harbor for delivering plan information that is required to be delivered to participants. (See page 7 for a list of disclosure requirements.)

### *Electronic Disclosure Safe Harbor Requirements:*

Plan information may be delivered electronically under the Electronic Disclosure Safe Harbor only if all of the following general requirements will be met:

**1.** The electronic system used must be designed to reasonably assure actual receipt of the information. This may require periodic reviews or surveys to confirm receipt of the electronically delivered information. Also, the plan administrator should be aware of, and follow-up on, undelivered and, to the extent known, unopened e-mails.

- 2.** The system must be designed to protect the confidentiality of the personal information of the participant who receives the information.
- 3.** A participant receiving an electronically delivered document must, at the time the document is delivered, be provided with a notice explaining the importance of the document and the right to receive a paper copy of the disclosure.
- 4.** Electronically delivered documents must be prepared in the style and format applicable to the particular disclosure.
- 5.** Electronically delivered documents must contain all of the information required to be included in the particular disclosure.
- 6.** Upon request, the participant must be provided a paper version of the document.

So long as these requirements are met, plan administrators have flexibility when providing information by electronic delivery methods. For example, a document may be sent in the text of an e-mail or as an attachment to an e-mail. A plan administrator may also send, via electronic or paper mail, a link to the required information on a website.

<sup>4</sup>29 CFR 2520.104b-1(c), 67 FR 17264 (April 9, 2002)

**ELECTRONIC DISCLOSURE SAFE HARBOR** recognizes two categories of individuals who may receive documents electronically: participants who “affirmatively consent” and employees who are “Wired at Work.”

## ELECTRONIC DISCLOSURE SAFE HARBOR

### “AFFIRMATIVE CONSENT”

To affirmatively consent, a participant or beneficiary must, before consenting, receive a clear statement describing:

- The types of documents to which the consent would apply;
- That consent can be withdrawn at any time without charge;
- The procedures for withdrawing consent and for updating the individual’s address for receiving electronically delivered documents;
- The right to request and obtain a paper version of an electronically delivered document, including whether the paper version will be provided free of charge; and
- Any hardware and software requirements for accessing and retaining the documents.

Additionally, if the disclosure documents are going to be delivered over the Internet, the participant or beneficiary must demonstrate the ability to access information by either consenting or confirming the consent electronically.

### “WIRED AT WORK”

This method is limited to current employees participating in a 401(k) or other retirement plan. To be “Wired at Work”:

- An employee must have the ability to effectively access electronic documents at any location where the employee performs duties as an employee, and
- Using the employer’s electronic information system must be an integral part of the employee’s duties.

Because this group uses their employers’ electronic system as a regular part of their employment, the DOL has not required the notice and system access safeguards that apply where participants and beneficiaries give “Affirmative Consent” to receive plan information electronically. In fact, it is an open question whether an employee who is “Wired at Work” may opt-out of receiving plan information electronically.

**NOTE:** A common question asked about the “Wired at Work” method is whether an employer may set up computer kiosks for use during work hours to access plan information when employees do not have computers on their desks. The DOL has consistently taken the position that mere “access” to a computer during working hours is insufficient; rather, access must be an “integral part” of the employee’s duties. Simply providing computer kiosks on a shop floor or in a mail room, even if employees may use the computers during working hours, does not make employees “Wired at Work.”

# ADDITIONAL ELECTRONIC DISCLOSURE METHODS *Approved by the DOL*

**THE DOL HAS ISSUED SOME ADDITIONAL METHODS** that allow additional electronic delivery methods in certain situations. Unlike the DOL Electronic Disclosure Safe Harbor, which can be used for all types of required plan information, these additional methods may only be used for certain types of plan information.

## *Continuous Access Website*

The DOL allows plans to make quarterly benefit statements available through “one or more secure continuous access websites.” In order to deliver quarterly benefit statement information on a website, the plan administrator must provide an annual notice to participants with the following information:

- An explanation of the availability of the information on a website,
- Instructions for how to access the information, and
- A notice of the participant’s right to request and obtain, free of charge, a paper copy of their quarterly benefit statements.

Plan administrators may send this notice electronically to participants who are either “Wired at Work” or who have given “Affirmative Consent” in accordance with the Electronic Disclosure Safe Harbor. Otherwise, the notice must be sent by first class mail or another approved method. Importantly, even if the notice must be sent to participants by first class mail, the quarterly benefit statement may still be provided on the Continuous Access Website.

Information that is required to be provided to participants such as information about fees charged against a participant’s account balance, is required

to be provided quarterly to participants. If the plan administrator elects to include this information in quarterly benefit statements, the information also may be delivered on a Continuous Access Website together with other information in the quarterly benefit statement.<sup>6</sup>

## *Assumed Consent*

In connection with the new participant information disclosure requirements the DOL also has issued further guidance relating to the use of electronic methods for delivering information to participants — called Technical Release.

Under Technical Release, the “Assumed Consent” method may be used to deliver information electronically. Specifically, the information that must be provided annually, a participant’s consent for electronic delivery may be “assumed” if:

- The participant is provided an initial notice that contains information similar to what is required under the DOL’s “Affirmative Consent” method;
- After receiving the notice, the participant voluntarily provides the plan administrator an e-mail address; and
- The plan administrator provides the participant an annual notice similar to the initial notice.<sup>7</sup>

<sup>6</sup>Section A of the Department of Labor Technical Release 2011-03R (Dec. 8, 2011)

<sup>7</sup>The Technical Release contemplates that required annual notice generally will be provided as a paper document but could be delivered electronically if the participant or beneficiary has electronically interacted with the plan since he or she last received a notice. The Technical Release provides examples of what is meant by electronically interacting with a plan, including logging onto a secure continuous access website that houses plan information, sending an e-mail to the plan or updating the e-mail the plan has on file or the opening of an electronic message sent by the plan.

# IRS ELECTRONIC MEDIA GUIDANCE

**ELECTRONIC MEDIA GUIDANCE** is the IRS's equivalent to the DOL's Electronic Disclosure Safe Harbor. These methods may be used to deliver most plan information required under the Internal Revenue Code, such as the 401(k) Safe Harbor and Auto Enrollment Notices. The DOL approved the use of IRS Electronic Media Guidance for delivering quarterly benefit statement information and for delivering notices of investment of participant account balances in a qualified default investment option or "QDIA."<sup>8</sup>

IRS Electronic Media Guidance provides two methods of electronic delivery of plan information. First, there is the "**GENERAL METHOD**," which has system, consent and notice requirements that are substantially similar to the requirements under the DOL's Electronic Disclosure Safe Harbor.

Second, the "**ALTERNATIVE METHOD**" allows information to be delivered through any medium so long as the recipient has the "effective ability to access." This includes electronic information delivery mediums such as e-mail and websites. To rely on the Alternative Method, a plan administrator must, at the time information is delivered, notify participants that they may request, free of charge, a paper copy of the information. Plan administrators who are considering the IRS Alternative Method must determine that a proposed electronic delivery method will meet the "effective ability to access" test, but there is only limited guidance available for making this determination.

**Here are some considerations:**

- In general, a plan administrator must have some evidence that the proposed information delivery medium will permit the participant to access the information. For example, the IRS has stated that it will not be sufficient to send e-mail to a participant's last known e-mail address. It is also not clear whether a recipient will have the ability to effectively access an electronic medium if the recipient does not have a computer in their home. (The spread of smart phones and tablets may be greatly reducing this population, however.)
- Employees may have the effective ability to access information through a worksite computer kiosk, even if not at their desk.
- Neither the IRS or DOL has commented on a scenario where an employer establishes an e-mail account for every employee solely for the purpose of providing ERISA information electronically.

Finally, the IRS Electronic Media Guidance is, generally, considered less restrictive than the DOL's Electronic Disclosure Safe Harbor. This means that electronic delivery meeting the conditions of the DOL's Safe Harbor (the Wired at Work or Affirmative Consent methods) will generally satisfy the IRS Electronic Media Guidance.

<sup>8</sup>72 FR 60452, 60458 (Oct. 24, 2007).

# DISCLOSURE REQUIREMENTS AND ELECTRONIC DELIVERY OPTIONS

Below are some important disclosure requirements along with their electronic delivery.

Disclosure Requirement	Description of Required Information	Electronic Delivery Options	Jurisdiction
<b>Summary Plan Description (SPD) and Summary of Material Modifications (SMM)</b> <i>29 CFR 2520.102 and 29 CFR 2520.104b-3</i>	The SPD provides a summary of the plan document and other key plan information. The SMM describes material changes to information furnished by the SPD.	<ul style="list-style-type: none"> <li>Wired at Work</li> <li>Affirmative Consent</li> </ul>	DOL
<b>Summary Annual Report (SAR)</b> <i>29 CFR §2520.104b-10</i>	The SAR is a summary of the annual financial report that most plans must file with DOL.	<ul style="list-style-type: none"> <li>Wired at Work</li> <li>Affirmative Consent</li> </ul>	DOL
<b>401(k) Traditional Safe Harbor Notice</b> <i>26 CFR §1.401(k)-3(d)</i>	The 401(k) Safe Harbor Notice provides information about a participant's rights and obligations under a Safe Harbor 401(k) plan.	<ul style="list-style-type: none"> <li>IRS General Method</li> <li>Alternative Method</li> </ul>	IRS
<b>Quarterly Benefit Statement (QBS)</b> <i>ERISA §105</i>	Quarterly statements providing information about the participant's account balance.	<ul style="list-style-type: none"> <li>Wired at Work</li> <li>Affirmative Consent</li> <li>Continuous Access Website</li> <li>Alternative Method (Effectively Able to Access)</li> </ul>	DOL or IRS
<b>Plan and Expense Information for Participant-Directed Plans</b> <i>29 CFR 2550.404a-5(c)</i>	For participants in participant-directed plans, plan information, including information about plan fees and expenses. This information generally must be provided before enrollment and annually; some fee information is required quarterly, and may be included in QBS.	<ul style="list-style-type: none"> <li>Wired at Work</li> <li>Affirmative Consent</li> <li>Assumed Consent</li> <li>Continuous Access Website (only for some information)</li> </ul>	DOL
<b>Investment Information for Participant-Directed Plans, provided in a table or other format that allows comparisons of plan investment options.</b> <i>29 CFR 2550.404a-5(d)</i>	Information about plan investment options, including performance and fees, must be provided before the participant's initial investment and at least annually, as set forth in the 404a-5 Regulation.	<ul style="list-style-type: none"> <li>Wired at Work</li> <li>Affirmative Consent</li> <li>Assumed Consent</li> </ul>	DOL
<b>Automatic Enrollment and Qualified Default Investment Alternative (QDIA) Notices</b> <i>29 CFR 2550.404c-5 and Internal Revenue Code §§401(k)(13)(E) and 414(w)(4)</i>	Notice to participants of the investment of their account in a default investment, if the participant does not provide investment directions. For plans with automatic enrollment, a description of the plan and automatic enrollment process, including percentage of salary to be automatically deferred and the plan's default investment and how to opt out of or change the default elections.	<ul style="list-style-type: none"> <li>Wired at Work</li> <li>Affirmative Consent</li> <li>Alternative Method (Effectively Able to Access)</li> </ul>	DOL or IRS
<b>Blackout Notice</b> <i>29 CFR 2520.101-3</i>	A notice that a temporary suspension, limitation or restriction on directing retirement funds, obtaining loans or obtaining distributions, for more than three consecutive business days is going to be imposed	<ul style="list-style-type: none"> <li>Wired at Work</li> <li>Affirmative Consent</li> </ul>	DOL
<b>Other IRS Notices, e.g., Rollover Notice and Qualified Domestic Relations Order (QDRO)</b>	Notices and disclosures required under IRS regulations in connection with certain events, e.g., reaching a certain age, leaving the plan or filing a QDRO with the plan.	<ul style="list-style-type: none"> <li>IRS General Method</li> <li>Alternative Method</li> </ul>	IRS

## *How The Principal Supports* **ELECTRONIC DISCLOSURE TO YOUR PLAN'S PARTICIPANTS**

**THE PRINCIPAL** has developed and is continuing to improve systems and procedures designed to support the use of electronic methods to provide information to your plan's participants. Our standard package of plan administration services allows your plan's participants to access, electronically, general information about the plan as well as individual account balance information and quarterly benefit statement on a continuous access website.

In the case of quarterly benefit statements and annual notices, the standard procedure of The Principal is to comply with the Continuous Access Website method unless you direct us otherwise.

- Participants who log on to receive their quarterly benefit statement information are prompted for sign-on information including a username and password.
- Participants who have not previously established these credentials are automatically prompted to establish their username and password, and are then provided access to their quarterly benefit statements.
- In general, The Principal will deliver the annual notice required by the DOL for using the Continuous Access Website method by e-mail, unless you direct us to deliver information to participants by first class mail, at the plan's expense.

The Principal electronic delivery systems allow a plan administrator to direct the use of electronic delivery methods for some groups of a plan's participants and beneficiaries, while directing the use of first class mail delivery for other groups of participants. For example, if some groups of employees have responsibilities that require computer access at their desks, a plan administrator may direct The Principal to use electronic delivery for this group based on the "Wired at Work" method, while preserving first class mail delivery for participants and beneficiaries who do not have this access.

### **FINAL CONSIDERATIONS**

Using e-mail and other "electronic" methods for delivering required plan information may simplify the disclosure process, provide more reliable information delivery, and possibly reduce plan administration costs over time.

We hope that this paper has helped you to understand the alternative methods for delivering information electronically to participants and beneficiaries in your plan. Should you have additional questions, please do not hesitate to contact a representative of the Principal Financial Group.



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The intent of this paper is to provide a general understanding of the electronic delivery rules and guidance under ERISA and is provided with the understanding that none of the member companies of The Principal are rendering legal, accounting, or tax advice. It is not a marketed opinion and may not be used to avoid penalties under the Internal Revenue Code. You should consult with appropriate counsel or other advisors on all matters pertaining to legal, tax, or accounting obligations and requirements.

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