ALERTS

Qualified Retirement Plan Updates: The Changing Landscape for Communication with Participants

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In February 2020, the U.S. Supreme Court issued a ruling that narrowed the definition of "actual knowledge" in a case that focused on the electronic delivery of disclosure documents. In May 2020, the U.S. Department of Labor ("DOL") expanded the methods by which plan sponsors can satisfy the disclosure requirements under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), when using electronic delivery for retirement plans documents. Thus, plan sponsors and administrators need to be cognizant of the ramifications of both the DOL's rule and the Supreme Court's ruling to ensure efficient and prudent administration of qualified plans.

Supreme Court Tightens the Actual Knowledge Standard

ERISA requires plaintiffs with "actual knowledge" of an alleged fiduciary breach to file suit within three years of gaining that knowledge, rather than within the six-year period that would otherwise apply. In *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, a case centered on the definition of actual knowledge under ERISA, the Supreme Court held that "actual knowledge" meant that the plaintiff "must in fact have become aware of that information." Constructive knowledge from proof of sufficient disclosure is not sufficient. Under the court's interpretation, actual knowledge requires concrete proof that the plaintiffs had read the relevant documents or otherwise taken affirmative actions that should

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have alerted them to the alleged breach, and not merely proof that the participant had received the relevant documents.

In light of that ruling, plans may wish to consider adopting procedures to confirm that participants have reviewed disclosures, such as (i) asking participants to electronically acknowledge that they have read and understood plan disclosures, (ii) reminding participants to read carefully, (iii) inviting participants to ask questions and (iv) ensuring that any electronic databases track participants' access of important disclosure documents. These steps, in addition to others, will help create an evidentiary record should proof be needed in a litigation.

Department of Labor Expands the Electronic Delivery Rule for Retirement Plans

The DOL announced a new rule, effective July 27, 2020, that allows employers to either post retirement plan disclosure documents on the plan sponsors' website or deliver them to participants by email, with the required document either in the body of the email or as an attachment. The DOL has stated that it will not take any enforcement action against a plan administrator that relies on the new rule before the effective date. Plan sponsors or administrators can selectively apply the new rule to some or all disclosures. The rule does not change the type of information that must be provided to beneficiaries and plan participants. Rather, it expands the mode of communication to include electronic messaging if the participant so desires. These provisions apply only to retirement plan disclosures. They do not apply to ERISA-required notices for health or welfare plans, nor do they apply to notices required solely by the IRS or other government agencies.

The DOL had been exploring ways to expand or revise the existing rules regarding electronic distribution of plan information since 2011. After considerable time, the DOL developed an expanded option which it estimates will allow plans to save approximately $3.2 billion in net cost by eliminating significant materials, printing and mailing costs associated with furnishing printed disclosures.

Under the new rule, generally all required retirement plan-related communications (other than those provided only upon request) may be posted to a website, provided that the affected individual receives a

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notice at a personal "electronic address," either an email address or smart phone, directing the individual to the website. A plan administrator cannot use this method if a participant does not have an electronic address and, for the eligible participants, the plan administrator should attempt to solicit a secondary electronic address to ensure delivery of the documents. If a plan administrator chooses to implement the safe harbor electronic communications program with respect to any individual, it must provide an initial paper notice that covered documents will be provided electronically to an identified electronic address; necessary access instructions; a "cautionary statement 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 the covered document"; and a statement of the right (free of charge) to obtain a paper version or to opt out of electronic delivery.

In addition, if a given notice or disclosure is going to be posted on the administrator's website, plan participants must be furnished with a "Notice of Internet Availability" each time a new covered document is made available on the website. The Notice of Internet Availability must include:

- A prominent statement that indicates "Disclosures About Your Retirement Plan";
- A statement that reads "Important Information about your Retirement Plan Is now Available. Please Review This Information";
- Identification of the document by name and a brief description of the document;
- The internet website address where the document is available;
- A statement of the participant's right to request and obtain a paper version of the document, free of charge;
- A statement of the participant's right, free of charge, to opt out of electronic delivery and receive paper versions of covered documents;
- A cautionary statement 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 the covered document; and
- A telephone number to contact the plan administrator.

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The rule allows an annual notice to include information about multiple documents. The rule also requires plan administrators to have a system in place to detect invalid electronic addresses and to ensure accurate electronic contact information for all plan participants, including in the case of a participant who was using a work email address and loses access to that email due to the cessation of the participant's employment. The system must be designed to alert the plan administrator if a message "bounces back" or an email is invalid or inoperable. In this case, the plan administrator should try to cure the problem by sending the disclosure to a secondary electronic address, obtain a new electronic address or treat the participant as having opted out of electronic delivery and send a paper notice as soon as reasonably practicable.

This is an expansion of the existing safe harbor rule that continues to be available, which allows plan administrators to electronically distribute plan documents and notices including documents for health and welfare plans, provided that certain conditions are met (e.g., the participant has to be able to effectively access electronic documents furnished at any location where he or she is reasonably expected to perform his or her duties).

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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