KM&M
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***Memorandum***

TO: Industry and Local 338 Pension Fund

FROM: Kauff McGuire & Margolis LLP

DATE: June 29, 2020

RE: Electronic Delivery of ERISA Retirement Plan Disclosures

## I. Background

On May 27, 2020, the Department of Labor (the "DOL") published its final rule creating a new safe harbor for electronic delivery of ERISA retirement plan disclosures. As finalized, the new safe harbor is the second regulatory effort taken to permit electronic delivery of ERISA documents, and will operate in addition to a 2002 safe harbor that also permits ERISA documents to be delivered electronically. However, unlike the new safe harbor, the 2002 safe harbor is limited and only applies to two groups of retirement plan participants:

- First, employees who are "wired at work," meaning employees with the ability to effectively access electronic disclosures at any location where they are reasonably expected to perform their employment duties and for whom access to the employer's electronic information system is an integral part of those duties.
- Second, individuals entitled to documents under Title I of ERISA who do not fit into the first category, but who affirmatively consent to receive documents electronically.

The principal limitation of the new safe harbor is that it only applies to retirement plan disclosures. Currently, the DOL is reviewing whether to expand the option to disclose documents and information electronically to health and welfare plans.

As stated by the DOL, the primary reasons for the new safe harbor are:

- To better leverage ongoing improvements in internet and mobile-phone-based technology and communications.
- To create a document delivery system that is appealing and practical for the modern workforce, as it becomes more technologically capable.
- To reduce the costs of retirement plan document and information delivery, as electronic delivery requires fewer physical resources.

To accomplish these objectives, the new safe harbor permits electronic delivery of retirement plan documents and information to a broader group of retirement plan participants in two different ways, as explained in more detail below:

- *Email.* Plan administrators may send documents directly to a participant's email address.
- *Notice-and-access: Website or Mobile Applications.* Plan administrators may make ERISA retirement plan documents and information available on websites and mobile apps if they send participants a Notice of Internet Availability ("NOIA"), which is an alert that the document is available electronically online or on a mobile app.

The new safe harbor will be effective 60 days after the date of its publication in the Federal Register, or July 27, 2020. However, the DOL, as an enforcement policy, will not take any enforcement action against a plan administrator that relies on the new safe harbor before that date.

## II. Individuals and Documents Covered by the New Safe Harbor

The new safe harbor applies to the following individuals, and allows the delivery of the following plan documents:

*A. Covered Individuals*

A "covered individual" is a plan:

- Participant;
- beneficiary; or
- other individual entitled to covered documents.

To be a covered individual, the plan participant must—when they begin participating in the plan—provide the plan with an "electronic address." The electronic address may be an email address, or smartphone number, at which the covered individual may receive an email containing a plan document or information, or an NOIA.

For transition purposes only, a plan administrator may rely on electronic addresses provided to the plan prior to the new safe harbor's creation without verifying that the address was provided by a covered individual, subject to the plan administrators acting reasonably, in good faith, and otherwise complying with the safe harbor's requirements.

*B. Covered Documents*

A "covered document" is any document or information that plan administrators are required to provide to plan participants and beneficiaries under Title I of ERISA. A document or information that is only required to be provided upon request is <u>not</u> a covered document.

For example, as relevant to the Industry and Local 338 Pension Fund, covered documents that must be provided under Title I of ERISA include, but are not limited to:

- Summary Plan Descriptions ("SPD").
- Summaries of Material Modifications ("SMM").
- Periodic Pension Benefit Statements.
- Annual Funding Notices.

Documents that are required to be provided only upon request include, but are not limited to:

- The Plan Restatement.
- The Trust Agreement.
- The latest form 5500.

The safe harbor's requirements for any document delivered to covered individuals electronically, whether through the notice-and-access method or email method, are:

- Documents must written in a manner reasonably calculated to be understood by the average plan participant.
- The document must be searchable electronically by numbers, letters or words.
- The document must be presented in a widely-available format or formats suitable for reading both online and in print.
- Individuals must be able to be permanently retain the document(s) electronically.

As to timing, the new safe harbor does not change the requirement that covered documents must be provided to individuals no later than the date on which they must be made available under ERISA generally.

## <u>**III. Mandatory Requirements for Electronic Delivery of Documents**</u>

### *A. Initial Paper Notice and Right to Opt Out*

Before documents may be delivered electronically through the new safe harbor, a plan administrator must provide each covered individual with a paper notice stating that the way in which they receive covered documents is changing, and that documents will be furnished electronically pursuant to the new safe harbor from that point on. This notice would be required to be sent to individuals who previously received covered documents by paper and participants who received documents pursuant to the 2002 safe harbor.

The paper notice must:

- Identify the electronic address that will be used for the individual.
- Contain any instructions necessary to access the covered documents.
- If documents will be provided through a website or mobile app, a cautionary statement that the covered document is not required to be available on the website or mobile app for more than one year or, if later, after it is superseded by a subsequent version of the covered document.
- A statement of 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. Only one paper copy of any covered document must be provided free of charge.
- A statement of the right, free of charge, to globally opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right. Individuals may also decide to opt out after they begin receiving documents electronically (for example, in the second year or later in a plan's electronic delivery program).

Plan administrators must also establish and maintain reasonable procedures governing electronic delivery elections, and requests to opt out or receive paper copies of covered documents. According to the new safe harbor, procedures are not reasonable if they are designed to or are administered in a way that inhibits or makes difficult a request to opt out or receive paper documents.

*B. Bounce Back Requirement*

The safe harbor provides that the delivery systems for NOIAs, or covered documents delivered directly by email, must be designed to alert plan administrators of a covered individual's invalid or inoperable electronical address (the "bounce back" requirement). If a plan administrator is alerted that a covered individual's electronic address is invalid or inoperable, such that a communication sent to that address is returned as undeliverable, the administrator must promptly take reasonable steps to cure the problem. This may include:

- Sending an NOIA or covered document to a valid and working secondary electronic address that had been provided by the covered individual; or
- obtaining a new email address for the covered individual.

If this cannot be done, the individual must be treated as if they opted out of electronic delivery for covered documents, and the administrator must provide a paper version of the undelivered document as soon as is reasonably practicable.

## IV. Electronic Document Delivery by Email

As specified earlier, documents may be provided directly to a covered individual's email address as provided by the individual. Unlike NOIAs that may be sent either to an individual's smartphone number or email address, covered documents may only be delivered to an individual's email address.

In an email of a covered document to an individual, the plan administrator must include:

- The covered document in the body of the email or as an attachment.
- A subject line that reads: "Disclosure About Your Retirement Plan."
- An identification of the covered document by name (for example, a statement that reads: "your periodic Benefit Statement is now available") and a brief description of the covered document if identification only by name would not reasonably convey the nature of the covered document.
- A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right.
- A statement of 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.
- A telephone number to contact the administrator or other designated representative of the plan.

The email must be written in a manner reasonably calculated to be understood by the average plan participant. The plan administrator must also take measures reasonably calculated to protect the confidentiality of the covered individual's personal information.

## V. Electronic Document Delivery via Websites and Mobile Apps

### *A. General Requirements for NOIAs*

If covered documents are provided pursuant to the new safe harbor's notice-and-access method through websites and mobile apps, plan administrators must ensure that a website or mobile app exists at which covered individuals can access the documents. Plans must also take reasonable measures to ensure that the website or mobile app protects covered individual's confidential information.

As mentioned earlier, plan administrators must provide to covered individuals through their email address or phone number an NOIA for each covered document that is posted on a website or mobile application; however, as explained below, in some circumstances a combined NOIA may be used to provide more than one document. Also, an NOIA must be provided separately from covered documents, except if a plan administrator issues a combined NOIA. Finally, an NOIA must be written in a manner calculated to be understood by the average plan participant.

*B. NOIA Timing Requirements*

NOIA's are subject to the following timing requirements:

- An NOIA must be provided at the time a covered document is made available on a website or mobile app.
- If a plan administrator provides a combined NOIA for more than one document, the NOIA must be provided each plan year. If the combined NOIA was distributed in the prior plan year, a subsequent combined NOIA must be sent to covered individual's no more than 14 months following the date the prior plan year's notice was sent.

*C. NOIA Content Requirements*

NOIA's must contain the following:

- A prominent statement—for example, as a title, legend, or subject line—that reads: "Disclosure About Your Retirement Plan."
- A statement that reads: "Important information about your retirement plan is now available. Please review this information."
- An identification of the covered document by name (for example, a statement that reads: "your Benefit Statement is now available") and a brief description of the covered document if identification only by name would not reasonably convey the nature of the covered document.
- The website address or mobile app (or hyperlink to the website address or mobile app) where the covered document is available. The website address or hyperlink must lead the covered individual either directly to the covered document or a login page that provides, or immediately after a covered individual logs on provides, a prominent link to the covered document.
- A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right.
- A statement of 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.

- 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.
- A telephone number to contact the administrator or other designated representative of the plan.

In addition, an NOIA may contain a statement as to whether a covered individual is invited or required to take action in response to the covered document and how to take such action, or that no action is required. An NOIA may also contain pictures or logos. The foregoing discretionary content may be included so long as the NOIA does not become inaccurate or misleading.

*D. Requirements for Combined NOIAs*

A plan administrator may provide one NOIA that combines the required content above for one or more of the following common ERISA disclosures, which include:

- A (1) SPD; (2) SMM; (3) an annual funding notice; and/or (4) a pension benefit statement.
- Any covered document or plan information that must be furnished annually, rather than upon the occurrence of a particular event, and does not require action by a covered individual by a particular deadline.
- Any covered document if authorized in writing by the Secretary of Labor, by regulation or otherwise, in compliance with Section 110 of ERISA.
- Any applicable notice required by the Internal Revenue Code if authorized in writing by the Secretary of the Treasury.

Examples of documents that may not be subject to a combined NOIA include claim determinations, as they require action by a covered individual by a specified deadline.

## VI. Procedures for Compliance Due to Unforeseen Circumstances

The new safe harbor recognizes that a plan's electronic delivery system may cause covered documents to be temporarily unavailable due to technical maintenance or unforeseeable circumstances beyond the control of the administrator. As such, the new safe harbor will not be violated due to these occurrences so long as:

- The administrator has reasonable procedures in place to ensure that the covered documents are available as otherwise required; and
- the administrator takes prompt action to ensure that the covered documents become available as soon as is practicable following the earlier of the time at

which the administrator knows or reasonably should know that the covered documents are temporarily unavailable.

## Conclusion

The ability to reduce paper mailings will help large plans achieve significant cost-savings. For smaller plans with minimal expenditures on plan mailings, this rule may not be as important relief as it is for large plans. If you are interested in implementing electronic delivery for the Industry and Local 338 Pension Fund, we can ask Associated Administrators, LLC to advise of its capabilities in this regard.