

**\*\*\*\* UPDATE: As of February 3, 2012, the DOL has extended the 408(b)(2) effective date to July 1, 2012 and the 404(a) effective date to generally be August 30, 2012. See [TCRS 2012-01](#) memo for details. \*\*\*\***

Date: December 19, 2011

**TCRS 2011-05: Department of Labor Releases Revised Interim Policy on use of Electronic Media for Certain Disclosures in Participant-Directed Individual Account Plans**

On September 13, 2011, the Department of Labor (“DOL”) issued Technical Release 2011-03, providing interim guidance on electronic delivery of participant fee disclosures under DOL Regulation §2550.404a-5. On December 8, 2011, the DOL issued Technical Release 2011-03R, further clarifying (i) the electronic delivery methods that may be used for the disclosures, and (ii) what disclosures may be furnished as part of a pension benefit statement.

**Effective Date of Delivery of Participant Fee Disclosures**

As a reminder, the effective date by which most of the initial participant fee disclosures must be made is generally May 31, 2012. See TCRS 2011-02 for more information on the effective date of the disclosures.

**Background**

On October 20, 2010 the DOL issued Reg. §2550.404a-5 regarding the disclosures that plan administrators are required to provide to participants and beneficiaries (hereinafter collectively referenced as “participants”) in order to satisfy their fiduciary duties under ERISA Section 404(a). See TCRS 2010-07 for more detail about the disclosures and the information that must be provided.

At the time the regulations were issued in 2010, the DOL did not provide guidance on the manner in which such disclosures could be provided electronically.

In the absence of new guidance, plan administrators would have been forced to rely on the existing regulations on electronic delivery (see DOL Reg. §2520.104b-1(c)).

The DOL is currently reviewing Reg. §2520.104b-1(c) and considering revisions in response to a significant number of requests from the retirement plans industry. Due to the complexity of this process, the DOL's desire to take into consideration the opposing viewpoints on electronic disclosure, and the fast approaching applicability date of the participant disclosure regulations, the DOL determined that interim guidance was necessary.

**Summary of Technical Release 2011-03R**

All of the disclosures under Reg. §2550.404a-5 may be furnished electronically, but (i) not all of the disclosures may be included as part of, or along with, pension benefit statement information, and (ii) the available methods of electronic delivery vary among the disclosures.

Disclosures that may be included as part of, or along with, pension benefit statement information (provided the timing requirements of the disclosures are met)

- Plan-related disclosures:
  - a) General plan information: (i) Initial disclosure and (ii) annual disclosure.
  - b) Administrative expense information: (i) Initial disclosure, (ii) annual disclosure, and (iii) at least a quarterly disclosure (when applicable) of administrative expenses actually charged to the participant's account(s) during the preceding quarter.
  - c) Individual expense information: (i) Initial disclosure, (ii) annual disclosure, and (iii) at least a quarterly disclosure (when applicable) of individual expenses actually charged to the participant's account(s) during the preceding quarter.
- All of the investment-related disclosures, including comparative chart information required by Reg. §2550.404a-5(d).

## Disclosures that may not be included as part of, or along with, pension benefit statement information

Plan-related disclosures: Any changes to the initial/annual disclosure of the general plan information, administrative expense information, and/or the individual expense information.

### Available Methods of Electronic Disclosure

The available electronic delivery methods vary, depending upon (i) whether the disclosures are actually included as part of, or along with, pension benefit statement information (if permissible), or (ii) whether the disclosures are provided separately from the pension benefit statement information.

Immediately below are brief descriptions of the electronic methods. Further below is a table listing the disclosures under Regulation §2550.404a-5 and which of the electronic methods are available for each disclosure.

Following are the possible electronic delivery methods, pursuant to:

- DOL Reg. §2520.104b-1(c), which limits electronic delivery to individuals who meet one of two classifications: (1) currently employed participants who have effective access to electronic disclosures wherever the participant is reasonably expected to work and where access to the electronic information system is an integral part of the participant's duties, and (2) other participants (including former employees, beneficiaries, and current employees who do not use a computer as an integral part of their duties) who affirmatively consent to receiving disclosures electronically; or
- DOL Field Assistance Bulletin 2006-03 ("FAB 2006-03"), which includes using a secure continuous access Web site, provided participants are provided notice of the availability of the disclosure information, how they may access the information, and apprising them of their right to request and obtain free paper versions; or
- Conditions described in Technical Release 2011-03R. Under this method, plan administrators may provide the required participant disclosures electronically (including using a secure continuous access Web site) so long as the following six requirements are satisfied:
  1. Participant voluntarily provides an e-mail address. Participants must voluntarily provide their e-mail address for purposes of receiving electronic disclosures. The requirement "voluntarily provide" means:
    - a. The address is provided in response to a request from the employer, plan sponsor, or plan administrator (or its designee) that is accompanied by an initial notice described in 2., below;
    - b. Providing the address is not a condition of employment or plan participation; and
    - c. Providing an address electronically to utilize a "secure continuous access" website containing the disclosure is considered voluntary (where the initial notice described in 2., below, has been provided).
  2. Plan Administrator provides an initial notice. The plan administrator must provide a clear and conspicuous notice, provided at the same time and in the same medium as the request for the e-mail address, that contains the following information and/or statements:
    - a. Providing an e-mail address is voluntary and will result in the electronic delivery of disclosures;
    - b. Identifying/describing the information that will be provided electronically and how participants can access it;
    - c. The participant has the right to receive paper copies of disclosures free of charge on request, and an explanation of how to exercise that right;
    - d. The participant may opt out of electronic disclosure at any time, and an explanation of how to exercise that right; and
    - e. Explaining how the participant may update his or her e-mail address.
  3. Plan Administrator provides an annual notice. Beginning the year after a participant voluntarily provided his/her e-mail address (and annually thereafter), the plan administrator must provide a notice that contains the information provided in the initial notice described above. The annual notice must be:
    - a. provided on paper, in accordance with DOL Reg. §2520.104b-1(b) (e.g. in-hand delivery or mailed), or
    - b. furnished electronically to the e-mail address on file, but only if there is evidence that the participant "interacted electronically" with the plan after the preceding year's annual notice was furnished (or in the case of the first annual notice, after the date the initial notice was furnished). Examples of "electronic interaction" with the plan include the participant updating, resubmitting, or confirming his/her e-mail address to the plan; sending an electronic message to the plan; logging onto a secure continuous access Web site housing plan information; or the receipt and opening of an electronic message sent by the plan to the participant.
  4. Notice is actually delivered. The plan administrator must ensure that the electronic delivery of notices is actually received by the participants (e.g. by using a return receipt or notice of undelivered electronic mail feature).
  5. Confidential information is protected. The electronic delivery system must protect participants' confidential information.
  6. Participant should be able to understand the notice. Notices must be written in a manner calculated to be understood by the average plan participant.

If participants' e-mail addresses are already on file with the employer, plan sponsor, or plan administrator, conditions 1 and 2 above are deemed satisfied if, instead of the initial notice described above, an alternative initial notice (i) is sent 30 – 90 days before the initial disclosures are required (e.g. if an initial notice is required by May 31, 2012, the alternative initial notice must be provided no earlier than March 2, 2012 and no later than May 1, 2012), (ii) containing the information

described in 2.b. – 2.e., (iii) the notice is provided (a) on paper, in accordance with DOL Reg. §2520.104b-1(b), or (b) furnished electronically to the e-mail address on file, but only if there is evidence that the participant “interacted electronically” with the plan during the 12-month-period preceding the date the alternative initial notice is furnished.

Table listing the disclosures under Reg. §2550.404a-5 and which of the electronic methods are available for each disclosure:

Disclosures under Reg. §2550.404a-5 and Available Electronic Delivery Methods		
Disclosure	If Disclosure <b>is included</b> in or with Benefit Statement, May Furnish Electronically in Accordance With:	If Disclosure <b>is not included</b> in or with Benefit Statement, May Furnish Electronically in Accordance With:
General plan information: <ul style="list-style-type: none"> <li>Initial disclosure</li> <li>Annual disclosure</li> </ul>	<ul style="list-style-type: none"> <li>DOL Reg. §2520.104b-1(c),</li> <li>FAB 2006-03, or</li> <li>Conditions described in Technical Release 2011-03R</li> </ul>	<ul style="list-style-type: none"> <li>DOL Reg. §2520.104b-1(c), or</li> <li>Conditions described in Technical Release 2011-03R</li> </ul>
Administrative expense information: <ul style="list-style-type: none"> <li>Initial disclosure</li> <li>Annual disclosure</li> <li>When applicable, at least a quarterly disclosure of actual expenses charged during the preceding quarter.</li> </ul>	Same as above.	Same as above.
Individual expense information: <ul style="list-style-type: none"> <li>Initial disclosure</li> <li>Annual disclosure</li> <li>When applicable, at least a quarterly disclosure of actual expenses charged during the preceding quarter.</li> </ul>	Same as above.	Same as above.
General plan information: Any changes to the initial/annual disclosure of general plan information	Not applicable.	Same as above.
Administrative expense information: Any changes to the initial/annual disclosure of administrative expense information	Not applicable.	Same as above.
Individual expense information: Any changes to the initial/annual disclosure of individual expense information	Not applicable.	Same as above.
Investment-related information.	<ul style="list-style-type: none"> <li>DOL Reg. §2520.104b-1(c), or</li> <li>Conditions described in Technical Release 2011-03R</li> </ul>	Same as above.

**Scope of Technical Release 2011-03R**

This is a temporary policy specifically limited to furnishing required disclosures under Reg. §2550.404a-5, until the DOL issues further guidance. No inferences should be drawn that guidance provided under this Technical Release or FAB 2006-03 will be reflected in changes, if any, to Reg. §2520.104b-1(c).

*This Summary is designed to provide an overview of the DOL’s interim policy on electronic disclosure for compliance with DOL Regulations under section 2550.404a-5, and is not intended to be comprehensive. The Transamerica Center for Retirement Studies® (“The Center”) is a non-profit corporation and private foundation. The Center may be funded by contributions from Transamerica Life Insurance Company and its affiliates or other unaffiliated third-parties. For more information about The Center, please refer to [www.transamericacenter.org](http://www.transamericacenter.org). The Center and its representatives cannot give ERISA, tax or legal advice. This material is provided for informational purposes only and should not be construed as ERISA, tax or legal advice. Interested parties must consult and rely solely upon their own independent advisors regarding their particular situation and the concepts presented here. Although care has been taken in preparing this material and presenting it accurately, The Center disclaims any express or implied warranty as to the accuracy of any material contained herein and any liability with respect to it.*