ELECTRONIC DISCLOSURE FOR ERISA 404(A)(5) PARTICIPANT FEE DISCLOSURE

September 19, 2011

The Department of Labor issued Technical Release No. 2011-03 ("Release") that relaxes the requirements for electronic delivery of the disclosures required by the ERISA 404(a)(5) Fee Disclosure regulations.

The Release establishes that the requirements for e-delivery of quarterly statements will apply to those disclosures that are permitted to be made on the quarterly statements. This was generally believed to be the case and represents no real change.

The quarterly statement requirements do not apply to other disclosures such as the comparative chart of investments and the plan information. The Release does provide a somewhat simplified e-delivery procedure for other 404(a)(5) delivery items.

The 404(a)(5) e-delivery Rules

The new e-delivery rules introduce four new concepts:

- **Initial Notice**. This notice is required before electronic delivery of the 404(a)(5) materials. No response is required from the recipient to use the new electronic delivery process.
- **Electronic Interaction**. Some form of related electronic activity is required within a prior 12 month period to qualify for electronic delivery of the transition Initial Notices for and Annual Notices thereafter.
- **Voluntary e-mail Addresses**. E-mail addresses obtained after the transition must be provided in response to a request and Initial Notice and may not be either assigned by the employer, mandated as a condition of employment or condition of participation in the plan.
- **Annual Notice**. Electronic delivery may be continued for succeeding years only if an Annual Notice is sent to the recipient prior to the delivery.

Transition Delivery

The first or "transition delivery" of 404(a)(5) material may be made electronically to eligible employees, participants and beneficiaries for whom e-mail addresses are available and who receive an Initial Notice. If there has been Electronic Interaction within the preceding 12 months, the Initial Notice may be delivered electronically. Paper delivery of the Initial Notice is required if there has not been Electronic Interaction in the preceding 12 months.

Taking advantage of the e-delivery rules begins with obtaining e-mail addresses and establishing Electronic Interactions.

This rule eliminates the need for an explicit adoption of e-delivery for the transition delivery. The volume of Initial Notices delivered on paper can be reduced by stimulating some form of Electronic Interaction before the Initial Notice has to be sent.

Annual Delivery

The annual delivery of 404(a)(5) disclosures can be made electronically for all participants but must be preceded by an Annual Notice. If there has been Electronic Interaction within the preceding 12 months, the Annual Notice may be delivered electronically. Paper delivery of the Annual Notice is required if there has not been Electronic Interaction in the preceding 12 months.

Annual Notices apply to transition participants and those who joined the plan after the transition.

Newly Eligible Employees

The disclosures to newly eligible employees require a Voluntary e-mail Address in response to a request that is accompanied by an Initial Notice in the same medium.

An existing non-Voluntary e-mail address may therefore be used to request a Voluntary e-mail Address.

As a practical matter, the request and Initial notice is best contained in a new employee package or an enrollment kit.

Taking Maximum Advantage of New Rules

The following steps should be taken to gain the maximum benefit from the new rules:

Immediately

- Maintain Records of Electronic Interactions.
- Start Capturing e-mail Addresses.
- Stimulate Electronic Interactions.

90 to 30 Days Before Transition Due Date

- Issue Initial Notices.
- Deliver Fee Disclosure
- Implement Request and Initial Notice.

After Transition Delivery

- Stimulate Electronic Interactions.

Before First Annual Due Date

- Prepare Annual Notice
- Issue Annual Notice
- Deliver Fee Disclosure