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Mailbox to Inbox: The SEC's Proposed E-Delivery Rules and What Employers Need to Know Now

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Federal securities laws impose delivery obligations on companies in connection with director and executive incentive equity compensation programs – from Form S-8 prospectuses to equity award agreements and even tender offer materials. Now, those rules may change in a significant way. The Securities and Exchange Commission (SEC) recently proposed Regulation E-Delivery, a sweeping new rule that would dramatically expand the ability of issuers and others to satisfy information delivery requirements electronically.

That proposed regulation is the subject of a July 21 Cooley alert, and we encourage you to read that alert to understand the potential sweeping significance of the proposed rule. The purpose of this alert is to highlight some of the relief around electronic delivery that already applies in the employer-employee context pending final approval of the proposed Regulation E-Delivery rule in whatever form that might take.

How we got here

Many required regulatory disclosures and reports under the federal securities laws have long been delivered in paper format. As internet and email access began to expand in the 1990s, the SEC began issuing interpretive guidance that permitted electronic delivery in some circumstances, provided generally that the person with a right to receive the applicable disclosures and reports affirmatively consented to e-delivery. In a 2000 Interpretive Release, the SEC resisted calls to expand e-delivery opportunities first provided in 1995/1996 releases. For example, in 2000, the SEC expressly concluded that the time had not yet come for an "access-equals-delivery" model, where investors would be assumed to have access to the internet, thereby allowing delivery to be accomplished solely by an issuer posting a document on the issuer's or a third party's website.

At the same time, the SEC in those 1995/1996 releases recognized that special relief is appropriate in the employer-employee context. At the heart of that relief is how to demonstrate evidence of delivery, one of the three elements of satisfactory electronic delivery in the current framework (along with notice and access). The 1995 release (Securities Act Release No. 7233 (Oct. 6, 1995)) provided that one method for satisfying the evidence-of-delivery element is to obtain an informed consent from an investor to receive information through a particular electronic medium. The 1996 release (Securities Act Release No. 7288 (May 9, 1996)) then provided that an issuer could presume consent to electronic delivery by employee-security holders who use the electronic mail system "in the ordinary course of performing their duties and ordinarily are expected to log-on to electronic mail routinely to receive mail and communications."

What this looks like in practice: Equity incentive plans and Form S-8

One critical example of where this relief is in play are the following e-delivery rules presently applicable to employers awarding grants under equity incentive plans in reliance on an S-8 registration statement based on the guidance from the 1995/1996 releases:

- **Presumed consent; access.** As noted above, an employer generally may presume consent to e-delivery by employees who are regular email users or, for those who are not regular email users, are able to receive e-delivery via other means, such as through administrative assistants or co-workers. However, the email must prominently state that a paper copy is available upon request, and the employer must in fact make paper copies available to any employee who asks.
- **Former employees.** Because of an expectation that former employees and service providers no longer have routine workplace access, former employees and service providers must provide informed consent to e-delivery.

- **Form of delivery.** The applicable materials can be attached to the e-delivery vehicle (for instance as attachments to an email) or, where documents are not directly attached , the e-delivery must provide employees and service providers with the information necessary to easily locate and retrieve them (g., directions for accessing them through the company's local area network or a third-party provider's equity program portal). The access medium must "not be so burdensome that intended recipients cannot effectively access the information provided," and recipients must have the opportunity to retain the documents or have ongoing access equivalent to personal retention.

The employer-employee relief is not limited to S-8 circumstances, however, and it can prove very useful in other employee compensation circumstances as well, such as issuer tender offers.

What now: What's next?

Proposed Regulation E-Delivery will likely establish new, uniform standards for electronic delivery of securities disclosures and reports – including the 10(a) prospectus under Form S-8. But the finish line is not here yet. In the meantime, compliance obligations under the current framework are fully effective, and the employer-employee e-delivery relief described above is available to use right now. Taking full advantage of existing relief requires attention to the details.

The applicable requirements are numerous and include rules that are easy to overlook –proper legending, maintaining a file of all prospectus materials for at least five years after they were last used, and the delivery rules that are the focus of this alert. Gaps in any of these areas can result in adverse consequences for your company and your employees, and the SEC's rule proposal is a timely reminder that employers should be aware of the obligations and monitoring compliance with them on an ongoing basis. Cooley's compensation and benefits group is ready to help you assess your current practices, close any gaps and position your program for the changes ahead. Reach out to your Cooley contact to get started.

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