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Satisfying the DOL's Safe Harbor When Using Electronic Technology to Comply with ERISA Disclosure Requirements

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This practice note provides practical guidance on how to satisfy the U.S. Department of Labor's (DOL) safe harbor (Safe Harbor) when using electronic technology to comply with the disclosure requirements under the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Generally, ERISA requires that plan administrators furnish to participants and beneficiaries certain documents including, most notably, the summary plan description (SPD), the summary of material modifications (SMM), and summary annual reports (SAR). Using a method "likely to result in full distribution," plan administrators must furnish communications like the SPD in a manner reasonably calculated to ensure actual receipt of the material. The DOL has approved delivery methods including first-class mail. Second or third class mail is acceptable if the plan administrator guarantees return/forwarding postage and requests address correction.

As described in more detail below, ERISA regulations establish a Safe Harbor where all pension and benefit plans covered under Title I of ERISA may use electronic media to satisfy the disclosure requirements. See 29 C.F.R. § 2520.104b-1(c). Specifically, this practice note covers the following issues concerning the Safe Harbor that you may encounter in your practice:

- Which plans are eligible to use the DOL's Safe Harbor?
- What types of communications does the DOL's Safe Harbor cover?
- What are the general requirements for using the DOL's Safe Harbor?
- Who may receive electronic disclosures under the DOL's Safe Harbor?
- What are the advantages of electronic distribution of forms and notices for plan sponsors?

The practice note also includes relevant forms:

- Sample SPD electronic notice for participants with direct access to the employer's electronic information system
- Sample consent form for beneficiaries and participants without direct access to the employer's electronic information system

Plans Eligible for the DOL's Safe Harbor

The Safe Harbor applies to the all benefit plans covered by ERISA Title I, including, without limitation:

- *Employee pension benefit plans.* These plans include defined benefit plans, defined contribution plans, 401(k) plans, profit sharing plans, employee stock ownership plans, simplified employee pension plans, and savings incentive match plans for employees.

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- *Employee welfare benefit plans.* These plans include all group health plans (medical, surgical, hospital care or benefits) and benefit plans in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds or pre-paid legal services.

The Safe Harbor does not apply to plans exempt from ERISA Title I, including the following plans:

- Top hat plans such as 457(b) non-government plans
- Governmental plans
- Church plans
- Severance pay plans

Note that while the DOL Safe Harbor does not apply to plans exempt from ERISA, the Internal Revenue Code (IRC) has similar rules on electronic communications that would be available. The Internal Revenue Service (IRS) electronic communication regulations apply to notices, consents and elections that are required to be in written form and for which the IRS has regulatory authority.

Types of Communications Covered

The Safe Harbor encompasses all ERISA Title I disclosures, including, without limitation, the following disclosures:

- Summary plan descriptions (SPDs)
- Summaries of material modification (SMMs)
- Summary annual reports (SARs)
- Individual benefit statements
- Investment related information under ERISA section 404(c)
- All plan documents that plan administrators must make available for inspection under ERISA or furnished on request under ERISA
- Summary of material reduction in covered services or benefits
- Qualified domestic relations order (QDRO) notices under ERISA section 206(d)(3)
- Qualified medical child support order (QMCSO) notifications under ERISA section 609
- Notifications of claims decisions
- Notice of special enrollment rights
- Women's Health and Cancer Rights Act (WHCRA) notices
- Medical Child Support Order (MCSO) notices
- National Medical Support (NMS) notices
- COBRA notifications under ERISA section 606
- Notice of significant reduction in future benefit accruals
- Notice of blackout period for individual account plans

The DOL Safe Harbor also applies to communications that are not required to be in writing such as plan enrollments, direct rollover elections, and beneficiary designations.

General Requirements

To comply with the DOL Safe Harbor, the plan administrator must follow these general requirements:

- *Actual delivery.* The plan administrator must design the electronic system to ensure actual receipt and provide information in a manner no less understandable to the recipient than if the recipient received the information in a written document. 29 C.F.R. § 2520.104b-1(c)(i)(A). To satisfy the actual delivery requirement, the plan administrator may use the return-receipt feature or undeliverable mail feature.
- *Style, format, and content.* Documents delivered electronically must satisfy the style, format, and content requirements that apply to the particular document. 29 C.F.R. § 2520.104b-1(c)(ii). The electronic document does not need to be identical in format to the paper version. If the formats are different, however, you should verify there are no substantive differences.

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- *Notice.* The plan administrator must design the electronic system to alert the recipient, at the time the plan administrator provides the applicable notice, to the significance of the information in the notice. 29 C.F.R. § 2520.104b-1(c)(iii). The plan administrator must provide clear instructions for accessing the notice.
- *Right to request a paper copy.* Documents delivered electronically must include a statement about the participant's right to request and receive a paper version. 29 C.F.R. § 2520.104b-1(c)(iv).
- *Confidentiality.* The plan administrator must design the electronic system to safeguard personal information that is confidential. 29 C.F.R. § 2520.104b-1(c)(i)(B). For example, the plan administrator should incorporate password protection into the system that precludes unauthorized receipt of, or access to, confidential information by anyone other than the participant or a beneficiary.

The DOL also allows a plan administrator to use a secure website, that provides continuous access to benefit information, to disclose pension benefit statements and investment fee disclosures to all individuals who have the "effective availability" to receive those disclosures by furnishing initially and annually a notice that

- (1) describes the availability of the benefit statements on the website;
- (2) explains how such information can be accessed by the participants and beneficiaries on the website; and
- (3) states the right to request and obtain, free of charge, a paper version of the pension benefit statement.

See EBSA Field Assistance Bulletin 2006-03 (Dec. 20, 2006) and DOL Technical Release No. 2011-03 (Sept. 13, 2011).

Who May Receive Electronic Disclosures?

Under the DOL regulation 29 C.F.R. § 2520.104b-1(c), plan administrators can only send electronic disclosures to (1) participants who have direct access to the employer's electronic information system (29 C.F.R. § 2520.104b-1(c)(iv)(2)(i)), or

(2) participants and beneficiaries who consent to receive disclosures electronically (29 C.F.R. § 2520.104b-1(c)(iv)(2)(ii)). You should advise plan administrators that they may not send electronic disclosures under the DOL Safe Harbor to any individual who does not fall within one of these two categories.

Participants Who Have Direct Access to the Employer's Electronic Information System

Under the following conditions, the plan administrator can send electronic disclosures to employees who have direct access to the employer's electronic information system without their consent:

- Employees must have the ability to effectively access electronic documents at any location where the employee performs duties as an employee (i.e., at work, or at home, if working from home).
- The use of employer's electronic information system must be an integral part of the employee's duties.
- The direct access of documents does not include computer kiosks in common areas such as employee lounges.

29 C.F.R. § 2520.104b-1(c)(iv)(2)(i).

Participants and Beneficiaries Without Direct Access to the Employer's Electronic Information System and Who Must Consent to Receiving Electronic Disclosures

Plan administrators may send electronic disclosures to participants or beneficiaries who do not have direct access to the employer's electronic information system but consent to receiving electronic disclosures. The DOL's Safe Harbor requirements to consent are as follows:

- *Affirmative consent.* The recipient must affirmatively consent (and not withdraw that consent) prior to the delivery of the electronic disclosure.
- *Demonstrate access to electronic disclosures.* The recipient must execute the consent in a manner that reasonably demonstrates that he or she can access the disclosure in the electronic form that the plan administrator will use to provide the disclosure.
- *Clear disclosure statement.* The recipient must receive a clear disclosure statement that
 - identifies the types of documents to which the consent applies;
 - explains the recipient's right to withdraw his or her consent;
 - provides the procedure for withdrawing consent and updating the recipient's electronic contact information;

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- explains the recipient's right to receive a paper copy of the notice after consenting to the electronic notice, and whether the plan administrator will charge any fee for such copy; and
- identifies the hardware and software requirements for accessing the electronic media (You should note that if the hardware or software requirements change, then the recipient must submit a new consent).
- *No oral communications.* The plan administrator cannot provide the applicable disclosure orally or through a recording of oral communications.
- *Electronic delivery of consent by recipient.* The recipient must electronically deliver the consent to the plan administrator. This provides evidence to the plan administrator that the recipient has a compatible computer system.

29 C.F.R. § 2520.104b-1(c)(iv)(2)(ii).

Advantages of Electronic Distribution for Plan Sponsors

Electronic distribution forms have become attractive and preferable for plan sponsors for a number of reasons including

- (1) cost efficiency for plan sponsors which directly impacts participants,
- (2) time efficiency,
- (3) improved tracking functions to confirm delivery,
- (4) ease of use (including the advantages of using hyperlinks to additional information) and ease of search functionality,
- (5) wide acceptance with millennials who favor technology driven platforms, and
- (6) consistency with corporate environmental and green initiatives.

A recent study has shown the benefits of electronic delivery of disclosure statements. The SPARK Institute reported a study that estimates a cost savings of 36% and reported on a 2015 Greenwald & Associates Telephone Survey, which concluded that 84% of plan participants find electronic delivery to be acceptable. See *Improving Outcomes with Electronic Delivery of Retirement Plan Documents*.

Sample SPD Electronic Notice for Participants with Direct Access to the Employer's Electronic Information System

Enclosed is a copy of the summary plan description (SPD) for the [insert name of plan]. The purpose of the SPD is to provide a basic summary of the Plan document including your eligibility, participation and rights with respect to the benefits under the Plan. You are receiving the attachment in a PDF format. You may need to download Adobe Reader to your computer to access and read the SPD. You may download Adobe Reader free of charge at <https://get.adobe.com/reader/>. You can also access the notice online at [insert website]. You have the right to request and receive a paper copy of the SPD, free of charge, by contacting the plan administrator at [insert plan administrator's e-mail address] or by calling [insert phone number].

Sample Consent Form for Beneficiaries and Participants Without Direct Access to the Employer's Electronic Information System and Who Must Provide Consent

CONSENT TO RECEIVE DOCUMENTS THROUGH ELECTRONIC TECHNOLOGY

As a former employee or beneficiary entitled to receive benefits under the [insert name of plan], I am entitled to certain documents required to be disclosed to me under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), including, but not limited to the following types of documents:

- Summary plan descriptions (SPDs)
- Summary annual reports (SARs)
- Investment related information under ERISA § 404(c)
- All plan documents that must be made available for inspection under ERISA or furnished on request under ERISA
- Qualified domestic relations order (QDRO) notices under ERISA § 206(d)(3)
- Notifications of claims decisions
- Women's Health and Cancer Rights Act (WHCRA) notices
- National Medical Support (NMS) notices
- Notice of significant reduction in future benefit accruals

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- Summaries of material modification (SMMs)
- Individual benefit statements
- Summary of material reduction in covered services or benefits
- Certificates of creditable coverage, notices of special enrollment rights and pre-existing conditions
- Qualified medical child support order (QMSCO) notifications under ERISA § 609
- Notice of special enrollment rights
- Medical Child Support Order (MCSO) notices
- COBRA notifications under ERISA § 606
- Notice of blackout period for individual account plans

The purpose of this notice is to inform you that you have the opportunity to receive disclosures in an electronic format. Prior to consenting to electronic disclosures, you should understand the following:

Right to Withdraw Consent: I understand that after I give consent to receive documents through electronic media, I may subsequently withdraw my consent at any time without charge. To withdraw consent, notify [insert name], [insert title], at [insert address], [insert phone number]; or submit an e-mail with the subject "Consent Withdrawn" to [insert plan administrator's e-mail address] that includes my full name, phone number, and mailing address where I would like documents to be sent.

Right to Update my E-mail Address: I understand that I may update my address for receipt of electronically furnished documents by contacting [insert name], [insert title], at [insert address], [insert phone number]. Or, I can send an e-mail to [insert plan administrator's e-mail address] that provides my updated address, with the subject "E-mail Address Change."

Right to Request a Paper Copy: I understand that I may request and obtain a paper version of any electronically furnished document free of charge. To request a paper copy, contact [insert name], [insert title], at [insert address], [insert phone number]; or send an e-mail to [insert plan administrator's e-mail address].

Notice of Change in Hardware or Software Requirements: I acknowledge that the following hardware and software requirements are required for accessing and retaining electronically furnished documents: [insert list of any hardware/software requirements for accessing and retaining documents].

CONSENT: I hereby consent to the electronic disclosure of all employee benefit plan notices and documents, which I have the right to receive under ERISA. I hereby confirm that I have carefully read the enclosed notice and consent form. I understand that I can request a paper copy at any time without charge, and that I can withdraw this consent at any time. I also confirm that I have the ability and the necessary equipment (hardware and software) to access the applicable websites and view documents.

_____ Employee Full Name

_____ Signature

_____ E-mail Address

_____ Date

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