

### Electronic Disclosure & Recordkeeping Requirements

#### Electronic Disclosure Requirements

The Pension and Welfare Benefits Administration ("PWBA") issued final rules establishing "safe harbor" standards for using electronic media for communications to satisfy ERISA disclosure obligations under Title I of ERISA, which will become effective October 9, 2002. The "safe harbor" rules do not foreclose other means that plan administrators might use to satisfy the ERISA disclosure obligations through electronic means.

The rules affect employee pension and welfare benefit plans, including group health plans, plan sponsors, administrators and fiduciaries, and plan participants and beneficiaries. Documents that may be furnished through electronic media are:

- Summary plan descriptions (SPDs);
- Summaries of material modification (SMMs);
- Summary annual reports (SARs);
- Individual benefit statements;
- A plan's Form 5500 Annual Report;
- Decisions on benefit claims;
- COBRA notifications under ERISA 606;
- Qualified domestic relations order notices (ERISA 206(d)(3));
- Qualified medical child support order notifications (ERISA 609);
- Information concerning participant loans (ERISA 408(b)(1));
- Investment-related information required to be provided in the case of plan fiducia-

ries seeking to be covered by ERISA 404(c); and

- A copy of any collective bargaining agreement under which a plan is established or operated.

This list is not all-inclusive, but covers the bulk of the ERISA Title I disclosures.

#### Requirements for Electronic Disclosures

In order to meet the "safe harbor" standards, the plan administrator must take steps that are reasonably calculated to ensure that the system for furnishing documents:

- Results in actual receipt of transmitted information (e.g., using return receipt or notice of undelivered electronic mail features and periodic reviews or surveys to confirm receipt of transmitted information); and
- Protects the confidentiality of personal information relating to an individual's account and benefits (e.g., incorporating into the system measures designed to prevent unauthorized receipt of—or access to—information by individuals other than the individual for whom the information is intended).

The electronically delivered document must be prepared and delivered in a manner that is consistent with the style, format, and content requirements applicable to the particular document so that each participant, beneficiary, or other individual is provided:

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- Notice (in electronic or non-electronic form) that informs the recipient of the significance of the document if it is not otherwise reasonably evident as transmitted; and
- Notice of the right to receive a paper version of that attached document on request.

### **Who May Be Provided Electronic Disclosures**

Participants who have the ability to effectively access documents furnished electronically at "any location where the participant is reasonably expected to perform his or her duties as an employee and with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties may be provided with an electronic disclosure. This statement is intended to clarify that the safe harbor extends to employees who work at home or who may be on travel, provided they have ready access to the employer's information system.

Additionally, participants, beneficiaries, and other persons<sup>1</sup> entitled to plan disclosures under Title I of ERISA who consent to receiving documents electronically through independent means may be provided with an electronic disclosure, provided that the following requirements are met:

- the individual to whom the electronic disclosure is being made must affirmatively consent to receive documents electronically and provide the address for receipt of documents;
- before consenting, the individual is provided a clear statement (in electronic or nonelectronic form) describing:
  - the types of documents to which the consent applies,

- the individual's right to withdraw consent at any time without charge,
- the procedures for withdrawing consent and for updating the individual's address for receipt of electronically furnished documents or other information,
- any software and hardware requirements to access the electronic documents, and
- the right of the individual to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge.

Following consent, if there are changes in hardware or software that may create a material risk that an individual will not be able to access documents electronically, the individual must be provided a statement of the revised hardware or software requirements for access to and retention of electronically furnished documents, as well as the right to withdraw consent without charge.

Additionally, the individual must again affirmatively consent to receive documents electronically.

PWBA also clarified that the use of a company's Web site is an acceptable method of "furnishing" disclosures, provided the distribution list for the periodical is comprehensive and up-to-date and a prominent notice appears on the front page of the publication advising readers that the publication contains important information about rights under the plan.

1. Under this provision, "other persons" includes an alternate payee within the meaning of the qualified domestic relations order provisions of ERISA 206, and a "qualified beneficiary," as defined under ERISA 607(3) in connection with the COBRA continuation rules.

## **Electronic Recordkeeping Requirements**

The PWBA issued a final regulation establishing standards for using electronic media for communications to satisfy ERISA disclosure obligations under Title I of ERISA, which will become effective October 9, 2002. The regulation can be found at 29 C.F.R. § 2520.107-1.

Record maintenance and retention requirements utilizing electronic media will satisfy the regulation if:

- The electronic recordkeeping system has controls reasonably expected to ensure the integrity, accuracy, authenticity and reliability of the electronic records;
- The electronic records are maintained in reasonable order and in a safe and accessible place, and in such manner as they may be readily inspected or examined (*i.e.*, the system should be capable of indexing, retaining, preserving, retrieving and reproducing the electronic records);
- The electronic records are readily convertible into legible and readable paper copy as may be needed to satisfy reporting and disclosure requirements or any other obligation under Title I of ERISA;
- The electronic recordkeeping system is not subject to any agreement or restriction that would directly or indirectly compromise or limit a person's ability to comply with any reporting and disclosure requirement or any other obligation under Title I of ERISA; and

- Adequate record management practices are established and implemented (*i.e.*, procedures for labeling electronic records, providing a secure storage environment, creating back-up electronic copies and having regular evaluations of the electronic recordkeeping system and periodic checks of electronically maintained or retained records).

### ***Disposing of Original Paper Records***

Original paper records may be disposed of at any time after they are transferred to an electronic recordkeeping system which complies with the final regulation unless the resulting electronic record would not constitute a duplicate or substitute record under the terms of the plan and applicable federal or state law. In addition, paper copies of records that cannot be clearly, accurately, or completely transferred to an electronic recordkeeping system must be retained.

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