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EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

ELECTRONIC DELIVERY RULES FOR BENEFIT PLAN COMMUNICATIONS

The Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code (“IRC”) require a number of participant notices, disclosures, elections, and consents to be provided in writing. The Internal Revenue Service (“IRS”) and the Department of Labor (“DOL”) have each promulgated regulations that permit these documents to be disseminated electronically as long as certain conditions are met. In addition, the Department of Health and Human Services (“HHS”), pursuant to its authority under the Health Insurance Portability and Accountability Act (“HIPAA”) has promulgated regulations regarding electronic disclosure of the notices of privacy practices

Department of Labor Rules

The DOL distribution regulations apply to communications over which the DOL has regulatory authority under Title I of ERISA. Communications subject to DOL rules include:

- Summary plan descriptions and summaries of material modifications
- Blackout notices
- QDIA notices
- Annual funding notices
- Notices of funding-based benefit restrictions
- Summary annual reports
- Retirement plan benefit statements
- Participant fee disclosures
- Automatic enrollment notices
- Notices of the right to divest employer securities
- Claims notices
- Notices relating to QDROs and QMCSOs
- COBRA notices
- Summaries of Benefits and Coverage (group health plans)
- Notice of health insurance marketplace (“exchange notice”)

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- HIPAA (excluding privacy notices, which are subject to special rules), WHCRA and various other health/welfare plan notices

In connection with certain qualified plan terminations, the Pension Benefit Guaranty Corporation (“PBGC”) requires distribution of a plan termination notice. The PBGC’s standards for disclosure in general and electronic disclosure in particular are consistent with DOL standards.

General DOL Standard for Distribution of Disclosures

In general, the DOL requires that a plan administrator must use “measures reasonably calculated to ensure actual receipt” of the material being distributed. Delivery in person or by first-class mail is always acceptable. Distribution by second- or third-class mail is acceptable if certain precautions are taken. However, it is never acceptable just to place copies in locations frequented by plan participants.

DOL Electronic Safe Harbor

The DOL has provided a regulatory safe harbor for electronic distribution of documents in keeping with the “reasonably calculated to ensure actual receipt” standard. In order for the safe harbor to apply, the recipient must be eligible to receive electronic disclosures. An individual is eligible for electronic disclosure if he or she falls into one of the following categories:

- Access to the employer's electronic information system is an integral part of his/her duties as an employee, and he/she has the ability to access electronic documents at any location where he/she is reasonably expected to perform his or her duties as an employee. This standard effectively requires that the individual have access to a personal computer workstation in the course of his/her employment, since the DOL has said that providing an electronic document through a common area computer, such as a kiosk, would not satisfy the safe harbor.
- He/she has consented to receive disclosure in electronic form in accordance with DOL consent requirements. The consent requirements state that the recipient must:
 - Have affirmatively consented (electronically or non-electronically) to electronic disclosure and not have withdrawn the consent;
 - Have reasonably demonstrated (via an electronic consent process or electronic affirmation of consent) the ability to access information in the relevant electronic form;
 - Have provided an address for receipt of the electronic document; and
 - Prior to consenting, have been provided with:
 - An explanation of the type of documents to be provided electronically and of the right to withdraw consent to electronic disclosure at any time;
 - Information on how to withdraw consent or update contact information;
 - A statement of the right to request a paper copy (and whether that paper copy will be provided free of charge); and

- A description of the hardware and software requirements for accessing the documents. If the hardware/software requirements change in a way that creates a material risk that the recipient will not be able to access or retain documents, the consenting recipient must be provided with an explanation of the change, must be given the right to withdraw consent, and must again consent to electronic disclosure.

It has become common for 401(k) plan recordkeepers to support the computer systems necessary to obtain and track consent to electronic disclosure. For plans and disclosures not covered by a recordkeeper's consent system, however, most employers find the consent requirements impractical, and limit electronic disclosure to active employees with their own computer workstations who regularly use the electronic information system in the course of their employment.

Even if an individual is eligible for electronic disclosure, the document in question must be provided in a manner that satisfies DOL standards:

- The electronic document must comply with all applicable legal requirements regarding style, format and content. For example, an electronic summary plan description ("SPD") must comply with the requirement that it be written in a manner calculated to be understood by the average plan participant and contain all the information that the regulations require an SPD to contain.
- If it is not reasonably evident from the transmittal, the electronic system must alert the recipient to the significance of the information contained in the electronic document. For example, in the case of a summary of material modifications posted to a website, the plan administrator might send an email or a postcard stating that, "A Summary of Material Modifications for [plan name] is available at [link/URL]. This Summary of Material Modifications updates your Summary Plan Description to reflect changes in your Plan benefits. You should read this document carefully, and file it with your Summary Plan Description in a safe place."
- The electronic system must be reasonably calculated to ensure actual receipt of the document. For example, this could be accomplished by use of return-receipt notice or undeliverable email features, or by conducting periodic surveys regarding receipt.
- The distribution must protect the confidentiality of personal information, if applicable. For example, if a plan allows participants to obtain benefit statements online, that function should require use of a personal password or PIN before a statement is made available, and should take appropriate precautions against efforts to hack the system.
- Upon request, the participant must be furnished with a paper version of the electronic document. The paper disclosure must be provided free of charge if the disclosure is a communication required to be furnished free of charge by ERISA (such as a participant's initial copy of an SPD). Individuals receiving electronic communications must be informed of this right.

Special Rules Applicable to Retirement Plan Benefit Statements

With respect to retirement plan benefit statements, compliance with either the usual DOL electronic disclosure rules or the IRS' electronic disclosure rules (discussed below) is acceptable. In addition, the DOL

has provided a more liberal safe harbor method of electronic delivery for plans which make statements available upon request via a secure website. This safe harbor can be satisfied even for employees who do not have regular access to a computer at their work station, and does not require participants to affirmatively consent to receiving electronic disclosure. Compliance with the secure-website safe harbor requires that participants have continuous access to benefit statement information, be notified at least annually of the ability to access the benefit statement via the website, and have the right to request a paper copy of the statement free of charge.

Special Rules Applicable to Fee Disclosures

Defined contribution plans (such as 401(k) plans) which allow participants to direct investments must provide participants and beneficiaries with specified information about the plan's investments and fees when they commence participation. An updated notice is required once a year (no later than 14 months after the prior issuance of the disclosures) and certain individualized information is required quarterly. The quarterly information is usually provided in conjunction with the participant or beneficiary's quarterly benefit statement, and can be provided in accordance with the rules applicable to benefit statements in that case. The initial and annual notice can be provided electronically under the usual electronic disclosure rules, or under a slightly more liberal set of rules. The special fee disclosure rules are satisfied if:

- The plan has obtained the participant or beneficiary's email address in accordance with DOL guidelines. Those guidelines require the email address to be provided voluntarily, and require the plan to provide the following information when requesting the email address:
 - A statement that providing an email address is voluntary, but that if an email address is provided, the disclosures will be made electronically;
 - Identification of the disclosures that will be made electronically and how they can be accessed;
 - A statement that the participant or beneficiary can request a paper copy of the information free of charge, and instructions on how to exercise that right;
 - A statement that the participant or beneficiary may opt out of electronic disclosures at any time, and instructions on how to exercise that right; and
 - An explanation as to how the participant or beneficiary can update his/her email address.
- The plan must provide an annual electronic distribution notice, which must be sent in paper form unless there is evidence that the participant has interacted electronically with the plan since the previous notice was provided.
- The plan administrator must ensure that the electronic delivery system results in actual receipt of the information (for example, through a "return receipt" feature).
- The delivery system must protect the confidentiality of personal information.
- All notices must be written in a manner that will be understood by the average plan participant.

Special Rule Applicable to Summary of Benefits and Coverage (“SBC”)

Group health plans must provide certain information regarding the plan in the form of an SBC. For participants and beneficiaries who are *already covered* under the group health plan, an SBC may be distributed electronically if the DOL’s ordinary safe harbor rules are met. In addition, even if the ordinary safe harbor rules are not met, an SBC may be distributed electronically to participants who enroll or renew coverage online. For participants and beneficiaries who are *eligible for but not enrolled in coverage*, the SBC may be distributed electronically if the format is readily accessible (e.g., use of HTML, Word or PDF format, etc.) and a paper copy is provided free of charge upon request. If the SBC is provided via an Internet posting, the plan must timely advise the individual in paper form or email that the document is available on the Internet, provide the internet address, and advise the individual that the documents are available in hardcopy format upon request.

HHS Rules

Special Rule Applicable to HIPAA Notices of Privacy Practices

If the group health plan maintains a website that provides information about benefits, the plan must prominently post its notice of privacy practices on the website; in the event of a material change to the notice, the plan must prominently post the change or its revised notice on its website by the effective date of the change.

A plan must also provide the notice to new enrollees and, in the event of a material change to the notice, it must provide the revised notice (or information about the material change) to individuals covered under the plan. These disclosure obligations can be satisfied via email delivery only if the individual consents. In the event that electronic delivery fails, a paper copy must be provided, and an individual retains the right to request a paper copy.

Internal Revenue Service Rules

The IRS generally has jurisdiction over participant notices, consents, and elections required under the IRC. In particular, IRS rules apply to distribution of the following types of documents:

- Safe harbor notices
- QACA/EACA autoenrollment notices
- Determination letter application notice to interested parties
- Distribution notices, including QJSA/QPSA waivers (special rules apply if notarization is required) and special tax notices
- 204(h) notices (special standards regarding confirmation of receipt apply)
- Cafeteria plan, EAP, and HSA notices, as well as notices for certain accident and health plans (excluding those under the jurisdiction of the DOL) and transportation fringe benefit plans

In a similar fashion to the DOL rules described above, the IRS rules create two classes of individuals eligible for electronic disclosure: those for whom no consent is needed in order to distribute documents electronically and those for whom advance consent must be obtained prior to electronic distribution.

When it comes to the consent requirements, the IRS and DOL rules are similar. The IRS requires a plan to give an individual the following information prior to obtaining his/her consent to electronic disclosure:

- A description of the scope of the consent, so that the recipient knows whether the consent is specific to a particular disclosure or covers all or some other disclosures;
- A statement of the individual's right to withdraw consent to receive disclosures electronically;
- A statement of the individual's right to receive a paper copy of any document, including the individual's right to request a paper copy (as well as a description of applicable fees);
- A description of any hardware/software requirements (with an update and a statement of the right to withdraw consent to be provided in the event of any changes that create a material risk that the individual will no longer be able to access or retain the disclosure, and reaffirmation of consent required following the change); and
- A description of the procedure for updating information to contact the participant electronically.

Consent must be given electronically, or given on paper but confirmed electronically in a manner that confirms the recipient's ability to access the electronic system. Consent does not cover oral disclosures (including recordings).

However, disclosure can be provided electronically *without* consent, and can even be provided in the form of an audio recording if appropriate to the communication content, if the following conditions are met:

- The recipient has an effective ability to access the medium through which the notice is provided. Whether a participant has an "effective ability to access" the medium is determined based on the surrounding facts and circumstances. Limiting electronic disclosure to individuals who satisfy the DOL standard is the safest approach, but other individuals may qualify.
- At the time the notice is provided, the recipient is advised of the right to receive a paper copy free of charge, and a free paper copy must be provided if requested.

Like the DOL, the IRS also sets standards regarding the manner in which disclosures can be distributed electronically. All electronic disclosures must meet the following general criteria:

- The timing and content rules that otherwise apply to the notice, election, or consent must be met.
- The electronic system must be designed to provide information in a manner that is no less understandable than if provided on a written paper document.
- The electronic system must be designed to alert the participant, at the time the notice is provided, to the significance of the information and provide any instructions needed to access the notice.
- The electronic notice/election must be maintained in a form capable of being retained and accurately reproduced for later reference.

In addition, electronic benefit elections and consents must meet special requirements as well as satisfying the usual rules:

- The electronic system used must be reasonably designed to preclude any person other than the appropriate individual from making the election.
- The electronic system must provide a reasonable opportunity for the participant to review, confirm, modify or rescind the terms of the election before it becomes effective.
- Within a reasonable time, the participant must receive confirmation of his/her election.
- Electronic notarization is permitted, but any signature required to be notarized or acknowledged by a plan representative must be witnessed in the physical presence of a notary public or plan representative.

If you have any questions regarding your compliance with these rules, please do not hesitate to contact any member of our firm's Employee Benefits and Executive Compensation Practice Group at 585.232.6500 or visit www.hselaw.com.

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