



## ERISA Electronic Disclosure Rules Summary

ERISA requires a plan to provide participants with certain documents including Summary Plan Descriptions (“SPD”), Summary of Material Modification (“SMM”) and Notice of Privacy Practices (“NPP”). This white paper has been developed to provide guidance on distribution of this material. It is important to note that Frenkel cannot be relied upon to provide legal advice and it is recommended that you discuss this with your counsel to ensure that this outline meets legal requirements in view of your particular facts and circumstances.

There are numerous regulations – please contact Frenkel if you have questions on what is summarized below.

### SPD/SMM Requirements

In general, documents required under ERISA (e.g. SPD) may be hand delivered, mailed or provided electronically so long as the DOL electronic safe harbor requirements are met.

The summary plan description is required to be provided:

- within 90 days of becoming a participant under the plan,
- within 30 days of a specific employee request for the SPD and
- every 5 years if there have been any changes; or every 10 years if there aren’t any changes

In addition, ERISA requires a Summary of Material Modification (SMM) to be issued any time there is a change in a plan provision that is “material” or any time there is a change in a plan provision within:

- 210 days after the close of the plan year in which a material modification to a plan provision is adopted,
- but 60 days after the date of adoption of a material reduction in plan benefits

Note that the Summary of Benefits and Coverage (SBC) rules impose additional requirements on the plan when changing benefits during the plan year. If material changes are made to benefits described in the most recent SBC provided to participants at times other than the plan’s annual renewal, the employer must provide a 60-day advanced notice of the changes either with an updated SPD or an SMM. If using an SMM, all such SMMs must be included with delivery of the SPD until the SPD is updated to include such modifications. There is no prescribed format for the SMM; it can be a separate document or a part of an annual open enrollment communication.

If posted to the company’s website the plan Administrator must:

- provide a written or electronic notice to employees directing them to the website in order to obtain the SPD, describing the SPD’s significance and the right to request a paper copy of that SPD
- and provide a paper copy of the SPD upon request without charge

In order to ensure “actual receipt,” the company could add a prominent link from the website’s homepage to the exact section that contains the SPD, provide directions on the website for how to replace a lost or forgotten password if one is needed and maintain the SPD on the website for a reasonable period of time following notice to employees of its availability. If the covered entity knows that the email transmission to an individual has failed, it must provide a paper copy of the notice to that individual.



## Notice of Privacy Practices Requirements

In general, the Notice of Privacy Practices (NPP) must be provided as a separate document at enrollment (in new hire enrollment materials) and within 60 days of any revision. In addition, the NPP must be provided to any individual (including non-participants) who requests it.

Every three years a reminder of the availability must be issued by sending a copy of the NPP, or mailing or including in a plan-produced publication a reminder that the NPP is available with information on how to obtain a copy.

If a covered entity maintains a website, the NPP must be posted there. It is unclear whether an enrollment website would be classified as maintained by the employer or the covered entity. However, it is still suggested that the NPP be made available throughout the enrollment website.

If the NPP is provided electronically the covered entity must have some kind of evidence or proof (which can be electronic, for example an opt-out question during the enrollment) on file that a person has in fact waived the right to receive the notice of availability in hard copy.

## Electronic distribution of ERISA-required disclosure documents

DOL regulations provide a safe harbor that describes how ERISA plans may use electronic delivery to provide documents, and other information required under ERISA, to participants. Plans are not required to comply with the DOL safe harbor rules, but compliance ensures that the DOL will find a plan's electronic delivery meets the general ERISA requirement that documents be furnished by a method "reasonably calculated to ensure actual receipt."

- The electronically delivered documents are prepared and furnished in a manner that is consistent with the style, format and content requirements applicable to the particular document.
- Notice is provided to each participant at the time a document is furnished electronically that apprises the individual of the significance of the document when it is not otherwise reasonably evident as transmitted (e.g. "the attached document describes changes in the benefits provided by your plan") and of the right to request and obtain a paper version of such document.
- Upon request the participant is furnished a paper version of the electronically furnished documents.

There are **two groups of individuals** that may receive ERISA required documents electronically and the requirements that apply to each category differ:

- Category One: plan participants that have the ability to regularly access the employer's electronic information system. The participant must have the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee and access to the employer's or plan sponsor's electronic information system is an integral part of those duties.
- Category Two: a participant, beneficiary or other individual not described in Category One that has affirmatively consented to receive information electronically.



Prior to consenting, the individual is provided in electronic or non-electronic form indicating: (i) the types of documents to which the consent will apply, (ii) that consent may be withdrawn at any time without charge, (iii) the procedure for withdrawing consent and for updating the address at which the electronic documents will be received, (iv) the right to request a paper version of any documents provided electronically along with procedures to obtain these documents, and (v) any software or hardware requirements for accessing and retaining the documents.

Each participant must be notified: (i) that the documents are being distributed electronically, (ii) of the significance of the documents, and (iii) of the right to request a paper copy of the document from the plan administrator.

Notices should be provided in paper format to former employees still covered by the plan (e.g. COBRA beneficiaries).

Electronic distribution rules apply to all ERISA notices including SPDs, SMMs, Premium Assistance, FMLA, WHCRA, and the Marketplace Notice.

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