



Disclosure Requirements for Plans Subject to Erisa and Sec Rules

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This summary discusses how to comply with ERISA and SEC disclosure requirements for a 401(k) plan that includes an option to invest employee contributions in employer securities and that is registered on SEC Form S-8. ERISA requires initial and periodic disclosure of a summary of the entire plan in the form of a summary plan description ("SPD"). Material changes must be disclosed in a summary of material modifications ("SMM"). The Securities Act also requires the same types of disclosure, the former in the form of a prospectus and the latter in the form of a prospectus supplement. Because the disclosure requirements of the two laws are similar, there are some opportunities to comply with both requirements in a single document.

When Must an SMM or Prospectus Supplement Be Provided?

Whenever there is a **material change** to a plan, both ERISA and the Securities Act require plan participants and beneficiaries to be given updates to their plan information. ERISA §102(a)(2), S.E.C. §428(b)(1)(i).*

Meeting the SMM Requirement

Time. An SMM must be furnished to each participant covered under the plan and each beneficiary receiving benefits under the plan no later than 210 days after the plan year in which a material modification is adopted. ERISA §104(b)(2)(B). An SMM need not be furnished to retired participants, vested separated participants, or beneficiaries receiving benefits if the material modification included in the SMM does not affect their rights under the plan. Labor Reg § 2520. 104b-4(c). For example, if the modification involves benefits to which a retired participant had not at any time been entitled, then the retired participant need not be furnished with an SMM. Labor Reg § 104b-4(c).

The SMM must also be filed with the Department of Labor within the same time period (no later than 210 days after the plan year in which a material modification is adopted). ERISA §104(a)(4)(B), §104(b)(1)(B).

Method of Distribution. Plan administrators must distribute all ERISA disclosure materials (including SMMs, SPDs and updated SPDs) using "measures reasonably calculated to

ensure actual receipt of the material by plan participants and beneficiaries" and "must be sent by a method of delivery likely to result in full distribution." Labor Reg § 2520.104b-1(b). In-hand delivery at the participants' worksite is an acceptable method of distribution, while placing copies of the material in a location frequented by participants is not. Labor Reg § 2520.104b-1(b). First-class mail is always acceptable, but second or third class mail is only acceptable if return and forwarding postage is guaranteed and address correction is requested. Labor Reg § 2520.104b-1(b). Further, if second or third class mail is returned with an address correction, it must be resent through first class mail or personal delivery at the participant's worksite. Labor Reg § 2520.104b-1(b).

Form. An SMM must be written in a manner calculated to be understood by the average plan participant. 29 C.F.R. § 2520.104(b)(3). Although the statute does not specify what information other than the material modifications should be in the SMM, plan administrators should include information necessary to facilitate filing with the Department of Labor, such as the name of the plan, the employer identification number assigned by the IRS, and the plan number assigned by the sponsor.

Meeting the Prospectus Supplement Requirement

Time. The Securities Act requires S-8 registrants to update information required by Part I, Prospectus Plan Information, of Form S-8 "in writing in a timely manner to reflect material changes during any period in which offers or sales are being made." 17 C.F.R. § 230.428. "A timely manner," under the Securities Act, means "prior to offers and sales of the registrant's securities." 1990 S.E.C. Lexis 1140 at *10, n41. Delivery must precede or accompany offers or sales of the registrant's securities in order to comply with Securities Act § 5(a). Securities Act of 1933, 15 U.S.C. §§ 77(a). Under a 401(k) plan, offers and sales of securities are made continually. Therefore, any plan change that is material to investment in employer securities under the plan must be disclosed in a prospectus supplement prior to its effective date. To meet updating requirements under the Securities Act, a prospectus supplement must be provided to each employee who is eligible to participate in the plan. 17 CFR § 230.428. As with the SMMs, delivery should be by a "means reasonably calculated to ensure actual receipt of the materials" by plan participants and beneficiaries. 1990 S.E.C. Lexis 1140 at *13. Desktop delivery is acceptable.

Plan information updating materials need not be filed with the S.E.C. CCH Federal Securities Law Reporter 6 7198(G). However, registrants must update other information in Part II of the S-8 by filing Exchange Act reports (10-Ks, 10-Qs or 8-Ks) with the S.E.C. CCH Federal Securities Law Reporter 6 7198(G), 17 CFR § 249.306.

The Securities Act further requires that registrants deliver to employees receiving the prospectus the registrant's annual report to its shareholders containing information as required by Rule 14(b)(3) of the Securities Exchange Act of 1934 for its latest fiscal year. 17 CFR § 230.428(b)(2)(i). Most companies prepare this report annually for delivery to its shareholders, and merely add a list of eligible employees' names to the list of shareholders.

Form. Many different forms of communication (e.g., a newsletter, memorandum or other written document) may serve as a prospectus supplement, so long as the information is presented in a clear and organized fashion and the document includes a legend in a conspicuous place at the beginning stating: "This document [Specifically designated portions of this document] constitutes [constitute] part of a prospectus covering securities that have been registered under the Securities Act of 1933." 1990 S.E.C. Lexis 1140 at *11, n52. When this updating information is furnished, registrants need not redeliver documents previously furnished. 17 CFR § 230.428(2)(b)(1)(i).

Using a Single Document as an SMM and Prospectus Supplement.

If a change to a plan is considered material for both ERISA and SEC purposes, a prospectus supplement may be used to satisfy the SMM requirement, since the prospectus supplement deadline is well in advance of the SMM deadline. If a change is only material for ERISA purposes, then an SMM may be issued under the more relaxed ERISA deadline rules.

When Must a Restated SPD or Prospectus be Provided?

Both ERISA and the Securities Act require plan administrators to furnish plan participants with new SPDs and prospectuses periodically.

Meeting the Restated SPD Requirement

Time. ERISA requires the filing and distribution of a new and updated SPD, integrating all amendments, no later than 210 days following the fifth year after the last date an SPD or updated SPD was distributed. Labor Reg § 2520.104b-2(b)(1). If there have been no amendments, a new SPD must be filed and distributed no later than 210 days after the tenth after year after the latest SPD or updated SPD was distributed.

Form. ERISA requires the new and updated SPD be prepared and distributed in the same manner as the initial SPD. Like the initial SPD, the updated SPD must be "written in a manner calculated to be understood by the average plan participant," containing examples and cross references. Labor Reg § 2520.102-2(a). The format must not have the effect of misleading or misinforming plan participants and beneficiaries, and restrictions on plan benefits should be described "in a manner not less prominent" than the way in which plan benefits are described. Labor Reg § 2520.102-2(b).**

Meeting the Restated Prospectus Requirement

Time. To comply with the Securities Act, a new and revised prospectus must be issued as soon as update supplements "have obscured the readability of the plan information or render it confusing." 17C.F.R. §230.428(b)(1)(iv). In any case, though, Securities Act §10 (a)(3) provides that when a prospectus is used more than nine months after the effective date of the registration statement, "the information contained therein shall be as of a date

not more than 16 months prior to such use, insofar as later information is known to the registrants." 17 CFR §230.427. Thus, no information in the prospectus can be more than 16 months stale. If later information regarding the same subject is available, and the information in the prospectus is 16 months old, you must distribute the new information to the plan participants. It is common for registrants to furnish participants with a new prospectus annually.

Form. The Securities Act does not specify a legal format for the prospectus plan information. In fact, the Securities Act expressly states in relevant part, that "an updated SPD ... may be used to update the Section 10(a) prospectus," provided that it: "(i) includes or is supplemented by an additional document or documents containing all information required by Form S-8 (See list above.); (ii) is appropriately legended; and (iii) is timely delivered to participants for purposes of the federal securities laws." Registration and Reporting Requirements for Employee Benefit Plans, S.E.C. Release Nos.33-6867, 34-28094,1990 SEC Lexis 1140 at *11, n51 (June 6, 1990).

Using a Single Document as an SPD and Prospectus

So long as a document includes all of the information required by ERISA and the SEC, its form can qualify as an SPD and as a prospectus. A new prospectus must be issued considerably more frequently than a new SPD, however, because of the 16-month rule. Therefore, if a new prospectus is timely issued and its form complies with both ERISA and the Securities Act, it will also constitute a timely issued SPD.

EXHIBIT A

"MATERIAL" CHANGES REQUIRING UPDATED INFORMATION

Securities Act Materiality

A change is considered "material" under the Securities Act if a reasonable investor would rely on the information in making an investment decision. *TSC Industriesv. Northway*, 426U.S. 438, 449, 96S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976). The controlling case on Securities Act materiality, *TSC Industriesv. Northway*, involved Section 14(a) of the 1934 Securities Exchange Act. However, its definition of materiality is considered the general standard for materiality and has been followed under other sections of the 1933 and 1934 Acts. Loss& Seligman, *Fundamentals of Securities Regulation*, 473. The information contained in Item 1 of the prospectus is probably information upon which a reasonable investor would rely, since it is information that the Securities Act requires to be distributed to plan participants. The following chart shows the FormS-8 information contained in Item 1. The column to the far right indicates whether the information should also be considered material under ERISA:

- General Plan Information
- a.

- The title of the plan and the name of the registrant whose securities are to be offered pursuant to the plan;
- YES
- b.
- The general nature and purpose of the plan, its duration, and any provisions for its modification, earlier termination or extension to the extent that they affect the participants;
- YES
- c.
- Whether the plan is subject to any provisions of ERISA, and the general nature of those provisions to which it is subject;
- YES
- d.
- Addresses and telephone numbers which participants may use to obtain additional information about the plan and its administrators;
- YES
- Securities to be offered
- a.
- Title and amount of securities to be offered pursuant to the plan;
- YES*
- b.
- The information required by Item 202 of Regulation S-K, unless common stock is registered under Section 12 of the Exchange Act, or if plan interests are being registered;
- NO
- Employees who may participate in the plan;
- YES
- Terms and procedures involved in purchasing securities pursuant to the plan and payment for securities offered;
- a.
- The period of time within which employees may elect to participate in the plan, the price at which the securities may be purchased pursuant to the plan;
- YES
- b.
- When and the manner in which employees are to pay for the securities purchased pursuant to the plan;
- YES*
- c.
- The amount each employee is required or permitted to contribute or, if not a fixed amount, the basis of computing contributions;
- YES
- d.

- If contributions are to be made under the plan by the registrant or any employer, state who is to make such contributions, when they are to be made and the nature and amount of each contribution;
- YES
- e.
- The nature and frequency of any reports to be made to participating employees as to the amount and status of their accounts;
- YES*
- f.
- [Does not apply to this case, because it only refers to plans that are not subject to ERISA.]
- Resale restrictions;
- YES*
- Tax effects of plan participation;
- NO
- Investment of funds;
- YES*
- Terms and conditions under which a participating employee may withdraw from the plan and terminate his or her interest therein;
- YES
- Whether, and the terms and conditions upon which, the plan permits an employee to assign or hypothecate his or her interest in the plan;
- YES*
- Every event which could result in a forfeiture by, or penalty to a participant, and the consequences thereof;
- YES
- Charges and deductions that may be made against employees participating in the plan.
- YES*

** Not specifically identified as material for ERISA purposes, but likely would be considered material.*

It is safe to assume that anything considered material under the Securities Act is material under ERISA as well, which will mean that the prospectus supplement should satisfy the SMM requirements as well and should be filed with the Department of Labor.

ERISA Materiality

As noted above, the items on the Securities Act Materiality chart should be considered material for ERISA purposes as well. The following is a list of information specifically identified as material for ERISA purposes, but not specifically identified as material for Securities Act purposes. A change in any of this information should be considered material for Securities Act purposes if it might reasonably affect an employee's decision to participate in or choose investments under the plan.

- Name and address of plan sponsor, plan administrator, trustee and agent for service of legal process.
- Identification of persons performing functions for the plan.
- Forms of distribution available for plan benefits.
- Procedures for presenting claims for benefits under the plan and appealing denied claims.
- Date of the end of the plan year and description of whether plan records are kept on the basis of the calendar, fiscal or insurance policy year.

EXHIBIT B

CONTENTS OF SUMMARY PLAN DESCRIPTION

[Labor Reg. § 2520.102-3]

The following information shall be included in the summary plan description of both employee welfare benefit plans and employee pension benefit plans, except as stated otherwise in paragraph (j) through (n):

(a) The name of the plan, and, if different, the name by which the plan is commonly known by its participants and beneficiaries;

(b) The name and address of--

(1) In the case of a single employer plan, the employer whose employees are covered by the plan,

(2) In the case of a plan maintained by an employee organization for its members, the employee organization that maintains the plan,

(3) In the case of a collectively-bargained plan established or maintained by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, parent or most significantly employer of a group of employers all of which contribute to the same plan, or other similar representative of the parties who established or maintain the plan, as well as

(i) A statement that a complete list of the employers and employee organizations sponsoring the plan may be obtained by participants and beneficiaries upon written request to the plan administrator, and is available for examination by participants and beneficiaries, as required by §§2520.104b-1 and 2520.104b-30; or

(ii) A statement that participants and beneficiaries may receive from the plan administrator, upon written request, information as to whether a particular employer or employee organization is a sponsor

of the plan and, if the employer or employee organization is a plan sponsor, the sponsor's address.

(4) In the case of a plan established or maintained by two or more employers, the association, committee, joint board of trustees, parent or most significant employer of a group of employers all of which contribute to the same plan, or other similar representative of the parties who established or maintain the plan, as well as

(i) A statement that a complete list of the employers sponsoring the plan may be obtained by participants and beneficiaries upon written request to the plan administrator, and is available for examination by participants and beneficiaries, as required by §§2520.104b-1 and 2520.104b-30, or,

(ii) A statement that participants and beneficiaries may receive from the plan administrator, upon written request, information as to whether a particular employer is a sponsor of the plan and, if the employer is a plan sponsor, the sponsor's address.

(c) The employer identification number (EIN) assigned by the Internal Revenue Service to the plan sponsor and the plan number assigned by the plan sponsor. (For further detailed explanation, see the instructions to the plan description Form-EBS-1 and "Identification Numbers Under ERISA" (Publ. 1004), published jointly by DOL, IRS, and PBGC);

(d) The type of pension or welfare plan, *e.g.*, for pension plans--defined benefit, money purchase, profit sharing, etc., and for welfare plans--hospitalization, disability, pre-paid legal service, etc.;

(e) The type of administration of the plan, *e.g.*, contract administration, insurer administration, etc.;

(f) The name, business address and business telephone number of the plan administrator as that term is defined by section 3(16) of the Act;

(g) The name of the person designated as agent for service of legal process, and the address at which process may be served on such person, and in addition, a statement that service of legal process may be made upon a plan trustee or the plan administrator;

(h) The name, title and address of the principal place of business of each trustee of the plan;

(i) If a plan is maintained pursuant to one or more collective bargaining agreements, a statement that the plan is so maintained, and that a copy of any such agreement may be obtained by participants and beneficiaries upon written request to the plan administrator, and is available for examination by participants and beneficiaries, as required by §§ 2520.104b-1 and 2520.104b-30. For the purpose of this paragraph, a plan is maintained pursuant to a collective bargaining agreement if such agreement controls any duties, rights or benefits under the plan, even though such agreement has been superseded in part for other purposes;

(j) The plan's requirements respecting eligibility for participation and for benefits. The summary plan description shall describe the plan's provisions relating to eligibility to participate in the plan, such as age or years of service requirements, and the items listed in paragraphs (j) (1) or (2) of this section as appropriate:

(1) For employee pension benefit plans it shall also include a statement describing the plan's normal retirement age, as that term is defined in section 3(24) of the Act, and a statement describing any other conditions which must be met before a participant will be eligible to receive benefits. Such plan benefits shall be described or summarized.

(2) For employee welfare benefit plans, it shall also include a statement of the conditions pertaining to eligibility to receive benefits, and a description or summary of the benefits. In the case of a welfare plan providing extensive schedules of benefits (a medical care plan, for example), only a general description is required if reference is made to detailed schedules of benefits which are available without cost to any participant or beneficiary who so requests;

(k) In the case of an employee pension benefit plan, a statement describing any joint and survivor benefits provided under the plan, including any requirement that an election be made as a condition to select or reject the joint and survivor annuity;

(l) For both pension and welfare benefit plans, statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

(m) For an employee pension benefit plan the following information:

- (1) If the benefits of the plan are not insured under Title IV of the Act, a statement of this fact, and reason for the lack of insurance; and
- (2) If the benefits of the plan are insured under Title IV of the Act, a statement of this fact, a summary of the pension benefit guaranty provision of Title IV, and a statement indicating that further information on the provisions of Title IV can be obtained from the plan administrator or the Pension Benefit Guaranty Corporation. The address of the PBGC shall be provided.
- (3) A summary plan description will be deemed to have complied with paragraph (m)(2) of this section if it includes the following statement in the summary plan description:

Benefits under this plan are insured by the Pension Benefit Guaranty Corporation (PBGC) if the plan terminates. Generally, the PBGC guarantees most vested normal age retirement benefits, early retirement benefits, and certain disability and survivor's pensions. However, PBGC does not guarantee all types of benefits under covered plans, and the amount of benefit protection is subject to certain limitations.

The PBGC guarantees vested benefits at the level in effect on the date of plan termination. However, if a plan has been in effect less than five years before it terminates, or if benefits have been increased with the five years before plan termination, the whole amount of the plan's vested benefits or the benefit increase may not be guaranteed. In addition, there is a ceiling on the amount of monthly benefit that PBGC guarantees, which is adjusted periodically.

For more information on the PBGC insurance protection and its limitations, ask your Plan Administrator or the PBGC. Inquiries to the PBGC should be addressed to the Office of Communications, PBGC, 2020 K Street NW., Washington DC 20006. The PBGC Office of Communications may also be reached by calling (202) 254-4817.

- (n) In the case of an employee pension benefit plan, a description and explanation of the plan provisions for determining years of service for eligibility to participate, vesting, and breaks in service, and years of participation for benefit accrual. The description shall state the service required to accrue full benefits and the manner in which accrual of benefits is prorated for employees failing to complete full service for a year.
- (o) In the case of an employee pension benefit plan that will use the "cutback" rule of Internal Revenue Service Ruling 76-378, IRB 1976-40, October 4, 1976, to make retroactive changes in the vesting or accrual provisions described in the summary plan description, a statement that certain provisions of the plan are subject to amendment which directly or indirectly modifies certain plan rights and benefits, the nature of such modifications, the identification by reference of

such plan provisions, and the identification by reference of the portions of the summary plan description where such provisions are described. Such statement may be either printed within the text of the summary plan description or it may be printed in a separate sheet and disclosed together with the summary plan description.

(p) The sources of contributions to the plan--for example, employer, employee organization, employees--and the method by which the amount of contribution is calculated. Defined benefit pension plans may state without further explanation that the contribution is actuarially determined.

(q) The identity of any funding medium used for the accumulation of assets through which benefits provided. The summary plan description shall identify any insurance company, trust fund, or any other institution, organization, or entity which maintains a fund on behalf of the plan or through which the plan is funded or benefits are provided.

(r) The date of the end of the year for purposes of maintaining the plan's fiscal records;

(s) The procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of Title I of the Act); and

(t)(1) The statement of ERISA rights described in section 104(c) of the Act, containing the items of information applicable to the plan included in the model statement of paragraph (t)(2) of this section. Items which are not applicable to the plan are not required to be included. The statement may contain explanatory and descriptive provisions in addition to those prescribed in paragraph (t)(2) of this section. However, the style and format of the statement shall not have the effect of misleading, misinforming or failing to inform participants and beneficiaries of a plan. All such information shall be written in a manner calculated to be understood by the average plan participant, taking into account factors such as the level of comprehension and education of typical participants in the plan and the complexity of the items required under this subparagraph to be included in the statement. Inaccurate, incomprehensible or misleading explanatory material will fail to meet the requirements of this section. The statement of ERISA rights (the model statement or a statement prepared by the plan), must appear as one consolidated statement. If a plan finds it desirable to make additional mention of certain rights elsewhere in the summary plan description, it may do so. The summary plan description may state that the statement of ERISA rights is required by federal law and regulation.

(2) A summary plan description will be deemed to comply with the requirements of paragraph (e)(1) of the section if it includes the following statement; items of information which are not applicable to a particular plan may be deleted: As a participant in (name of plan) you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all plan participants shall be entitled to:

Examine, without charge, at the plan administrator's office and at other specified locations, such as worksites and union halls, all plan documents including insurance contracts, collective bargaining agreements and copies of all documents filed by the plan with the U.S. Department of Labor, such as detailed annual reports and plan descriptions.

Obtain copies of all plan documents and other plan information upon written request to the plan administrator. The administrator may make a reasonable charge for the copies.

Receive a summary of the plan's annual financial report. The plan administrator is required by law to furnish each participant with a copy of this summary annual report.

Obtain a statement telling you whether you have a right to receive a pension at normal retirement age (age * * *) and if so, what your benefits would be at normal retirement age if you stop working under the plan now. If you do not have a right to a pension, the statement will tell you how many more years you have to work to get a right to a pension. This statement must be requested in writing and is not required to be given more than once a year. The plan must provide the statement free of charge. In addition to creating rights for plan participants ERISA imposes duties upon the people who are responsible for the operation of the employee benefit plan. The people who operate your plan, called "fiduciaries" of the plan, have a duty to do so prudently and in the interest of you and other plan participants and beneficiaries. No one, including your employer, your union, or any other person may fire you or otherwise discriminate against you in any way to prevent you from obtaining a (pension, welfare) benefit or exercising your rights under ERISA. If your claim for a (pension, welfare) benefit is denied in whole or in part you must receive a written explanation of the reason for the denial. You have the right to have the plan review and reconsider your claim. Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from the plan and do not receive them within 30 days, you may file suit in a federal court. In such a case, the court may require the plan administrator to provide the materials and pay you up to \$100 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the administrator. If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or federal court. If it should happen that plan fiduciaries misuse the plan's money, or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court. The court will decide who should pay court costs and legal fees. If you are successful the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees, for example, if it finds your claim if

frivolous. If you have any questions about your plan, you should contact the plan administrator. If you have any questions about this statement or about your rights under ERISA, you should contact the nearest Area Office of the U.S. Labor-Management Services Administration, Department of Labor.

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