

IRS Proposes Regulation for Electronic Transmission of Employee Benefit Plan Notices, Elections and Consents

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On July 13, 2005 the Internal Revenue Service (IRS) and the Treasury Department issued proposed regulations for the use of electronic media to provide notices to plan participants and beneficiaries or to transmit elections or consents relating to employee benefit plans. The regulations focus on the coordination of Internal Revenue Code (IRC) notification requirements for employee benefit plan participants with the provisions of the Electronic Signatures in Global and National Commerce Act (E-SIGN). Generally, the proposed regulations set guidelines on consent procedures for any plan sponsor using electronic media to provide a notice or to transmit a participant election if the notice or election is required to be in writing under the IRC or Treasury regulations. The proposed regulations also provide a safe harbor for communicating electronically to participants when the communications are not required to be in writing. Electronic media include websites, e-mail, telephonic systems and CD-ROMs.

E-SIGN generally provides that electronic documents and signatures are the legal equivalents of their paper counterparts. To protect consumers however, E-SIGN imposes some limitations on the use of electronic media. Specifically, E-SIGN requires advance consent from participants to the use of electronic media for communications. The Treasury Department classifies employee benefit plan participants as consumers and requires adequate consent procedures as well. The proposed regulations also provide an alternative to the E-SIGN consent procedure for participant elections that is less burdensome for employers yet still protective of participants.

Scope of the Regulations

The proposed regulations apply to any notice, election or similar communication provided to or made by a participant or beneficiary under the following types of benefit arrangements:

- Qualified plan
- Annuity contract described in section 403(a) or 403(b)
- Simplified employee pension plan under section 408(k)

- Simple retirement plan under section 408(p)
- Eligible governmental plan under section 457(b)
- Accident and health plans under section 104(a)(3) or 105
- Cafeteria plan under section 125
- Educational assistance program under section 127
- Qualified transportation fringe benefit program under section 132
- Archer Medical Savings Account under section 220
- Health savings account under section 223

The regulations do not apply to any notice, election, consent or disclosure over which the DOL or PBGC has interpretive or regulatory authority, such as certain notices and disclosures required under Title I or Title IV of the Employee Retirement Income Security Act; suspension of benefits notices under section 411(a)(3)(B); or any notices relating to an individual's COBRA rights under section 4980B(f)(6).

Participant Consent to Electronic Media

In addition to satisfying any other applicable requirements, E-SIGN and the proposed regulations require a form of consent prior to the use of electronic communication for plan participants. A participant must affirmatively consent in one of two ways: (1) in a manner that reasonably demonstrates that the participant can access the notice in the electronic form or (2) through the use of a paper document if, again, the participant confirms the consent in a manner that reasonably demonstrates that the participant can access the notice in electronic form. A participant can send a response email, for example, as verification of receipt of electronic notice or paper communication from an employer or plan sponsor. Prior to giving consent, the participant must receive the following information in a disclosure statement:

- Scope of consent (including duration and transaction types that will utilize electronic communication)
- Participant's right to receive a paper or nonelectronic document
- Participant's right to request a paper copy after consent, including information about any applicable fees
- Participant's right to withdraw his or her consent to receive communication electronically (including the procedures and any potential costs associated with withdrawal)
- Description of the contact procedures for updating participant information
- Hardware and software specifications for accessing the electronic information

Software or hardware changes made after consent require an additional explanation of the revised hardware or software features and the right of the participant to withdraw the previous consent without the imposition of fees.

The proposed regulations also provide an exemption from the E-SIGN consent requirements if the recipient is effectively able to access the electronic medium and is advised that he or she can request a paper copy at no charge.

In addition to satisfying the consent requirements, the system of electronic delivery must be reasonably designed to provide information in a format that is as clear and consumer-friendly as a written document. The system must also alert the participant to the significance of the transmittal and provide understandable and accessible instructions.

Special Rules for Participant Elections

If a consent, request, election, agreement or similar communication is made by or from a participant, beneficiary or alternate payee using an electronic medium, it must meet the following requirements:

- Participant is effectively able to access the electronic system in order to transmit the election
- Electronic system is reasonably designed to preclude any person other than the participant from making the participant election (e.g., through the use of personal identification numbers or account numbers with password verification)
- Electronic system provides the participant with the reasonable opportunity to review, confirm, modify or rescind the terms of the election before it becomes effective
- Participant receives confirmation of the election in a reasonable time period through a written paper document or an electronic medium

The proposed regulations also permit the extension of electronic media use to a participant election that is required to be witnessed by a plan representative or notary public, but only if the plan representative or notary public witnesses the electronic signature.

Additional Information

The Department of Treasury and the IRS are accepting written or electronic comments on the proposed regulations through October 12, 2005. Although these regulations will not be in effect until finalized, employers should begin to think about advantages, disadvantages and steps for compliance, including:

- Determining if the use of electronic media will decrease costs associated with providing participant elections and notices;
- Understanding the components of any electronic delivery system currently in place to verify compliance with the proposed consent requirements;
- Working with members of the information technology team on developing an electronic communication process that is easily accessible to and compatible for participants;
- Drafting a disclosure statement listing the specific uses for and the duration of the electronic media; and
- Implementing a system of email verification to ensure that recipients have received electronic communications.

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