

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 35, and 54

[TD 9294]

RIN 1545-BD68

Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations setting forth standards for electronic systems that make use of an electronic medium to provide a notice to a recipient, or to make a participant election or consent, with respect to a retirement plan, an employee benefit arrangement, or an individual retirement plan. These regulations reflect the provisions of the Electronic Signatures in Global and National Commerce Act (E-SIGN). These final regulations generally affect sponsors of, and individuals entitled to benefits under, certain retirement plans, employee benefit arrangements, and individual retirement plans.

DATES: Effective date: These regulations are effective on October 20, 2006.

Applicability date: These regulations generally apply to applicable notices provided, and participant elections made, on or after January 1, 2007. See §1.401(a)-21(g).

FOR FURTHER INFORMATION CONTACT: Pamela R. Kinard at (202) 622-6060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information referenced in these final regulations were previously reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-1632, in conjunction with the Treasury Decision (TD 8873), relating to New Technologies in Retirement Plans, published on February 8, 2000 in the **Federal Register** (65 FR 6001), and control number 1545-1780, in conjunction with the Treasury Decision (TD 9052), relating to Notice of Significant Reduction in the Rate of Future Benefit Accrual, published on April 9, 2003 in the **Federal Register** (68 FR 17277). Responses to these collections of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to these collections of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to 26 CFR parts 1, 35, and 54 under section 401 of the Internal Revenue Code (Code) and other sections of the Code relating to retirement plans, employee benefit arrangements, and individual retirement plans. This Treasury Decision adds §1.401(a)-21 to the Treasury regulations, which sets forth standards for the use of an electronic medium to provide applicable notices to recipients, or to make participant elections, with respect to a retirement plan, an employee benefit arrangement, or an individual retirement plan. These final regulations reflect the applicable provisions of the Electronic Signatures in Global and National Commerce Act, Public Law 106-229 (114 Stat. 464 (2000)) (E-SIGN) as it relates to the electronic delivery of notices.

The Code and regulations thereunder, and the parallel provisions of the Employee Retirement Income Security Act of 1974 (ERISA), include a number of rules that require certain notices, elections, or consents to be written or in writing. Examples of notices, elections, or consents required to be written or in writing include a section 402(f) notice (describing rollover rights), a section 411(a)(11) notice (describing a participant's benefit commencement rights), a spousal consent under section 417(a)(2), and a section 204(h) notice (notice to participants of significant reduction in rate of future benefit accrual). For a more in-depth description of retirement plan notices, elections, or consents that are required to be written or in writing, see the background section to the preamble of the 2005 proposed regulations (70 FR 40675).

E-SIGN

E-SIGN, signed into law on June 30, 2000, generally provides that electronic records and signatures are given the same legal effect as their paper counterparts. Section 101(a) of E-SIGN provides that, with respect to a transaction in or affecting interstate or foreign commerce, notwithstanding any statute, regulation, or rule of law, a signature, contract, or other record may not be denied legal effect, validity, or enforceability solely because it is in electronic form and a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.¹

Section 101(b) of E-SIGN provides that E-SIGN does not limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to a person's rights or obligations under any statute, regulation, or rule of law except with respect to a requirement that contracts or other records be written, signed, or in non-electronic form, and also provides that E-SIGN generally does not require any person to agree to use or accept electronic signatures or records.

Section 101(c) of E-SIGN sets forth special protections that apply when a statute, regulation, or other rule of law requires that information relating to a transaction be provided or made available to a consumer² in writing. Under section 101(c) of E-SIGN, before the required information can be provided or

¹ The rules of section 101 of E-SIGN do not apply to certain consumer notices. These include consumer notices that are necessary for the protection of a consumer's health, safety, or shelter (e.g., cancellation of health benefits or life insurance and foreclosure on a credit agreement secured by an individual's primary residence). See section 103(b)(2)(B) and (C) of E-SIGN.

² Section 106(1) of E-SIGN generally defines a consumer as an individual who obtains products or services used primarily for personal, family, or household purposes.

made available electronically, a consumer must first affirmatively consent to receive the information electronically and the consent must be made in a manner that reasonably demonstrates the consumer's ability to access the information in electronic form (or, if the consent is not provided in such a manner, confirmation of the consent must be made electronically in a manner that reasonably demonstrates the consumer's ability to access the information in electronic form). Prior to consent, the consumer must receive certain specified disclosures. The disclosures must include, among other items, the hardware or software requirements for access to, and retention of, the electronic records, the consumer's right to withdraw his or her consent to receive the information electronically (and the consequences that follow the withdrawal of consent), the procedures for requesting a paper copy of the electronic record, and the cost, if any, of obtaining a paper copy. Section 101(c)(6) of E-SIGN generally provides that, for purposes of the consumer consent rules of section 101(c), an oral communication or a recording of an oral communication does not qualify as an electronic record.

Section 101(e) of E-SIGN provides rules relating to the electronic retention of contracts and other records that are required to be written or in writing. Section 101(e) of E-SIGN provides that if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be in writing, the legal effect, validity, or enforceability of an electronic record of the contract or other record may be denied if the contract or other record is not in a form that is capable of being

retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.

Section 104(b)(1) of E-SIGN generally provides that a Federal regulatory or State regulatory agency that is responsible for rulemaking under any other statute has interpretative authority to issue guidance interpreting section 101 of E-SIGN with respect to that other statute. However, as a limitation on that authority, section 104(b)(2) of E-SIGN prohibits the issuance of any guidance that is not consistent with section 101 or that adds to the requirements of that section. Section 104(b)(2) of E-SIGN also requires that any agency issuing guidance interpreting E-SIGN find that there is a substantial justification for the guidance and that the methods selected to carry out the purpose of the guidance are substantially equivalent to the requirements imposed on records that are not electronic, do not impose unreasonable costs on the acceptance and use of electronic records, and do not require or accord greater legal status to a specific technology.

Section 104(d)(1) of E-SIGN authorizes a Federal regulatory agency to exempt, without condition, a specified category or type of record from the consumer consent requirements in section 101(c). The exemption may be issued only if the exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

In accordance with section 104(b)(2)(C) of E-SIGN, the Treasury Department and IRS find that there is substantial justification for these final

regulations, that, for the reasons explained below, the requirements imposed on the use of electronic media under these regulations are substantially equivalent to those imposed on non-electronic records, that the requirements will not impose unreasonable costs on the acceptance and use of electronic records, and that these regulations do not require (or accord greater legal status or effect to) the use of any specific technology.

Prior Guidance Relating to Electronic Communications

The Treasury Department and IRS have issued several items of guidance relating to the use of electronic media with respect to retirement plans and individual retirement plans.³ Section 1510 of the Taxpayer Relief Act of 1997, Public Law 105-34 (111 Stat. 788, 1068) (TRA '97), provides for the Secretary of Treasury to issue guidance designed to interpret the notice, election, consent, disclosure, and timing requirements (include related recordkeeping requirements) under the Code and ERISA relating to retirement plans as applied to the use of new technologies by plan sponsors and administrators. Section 1510 of TRA '97 further provides that the guidance should maintain the protection of the rights of participants and beneficiaries.

Final regulations (TD 8873) relating to the use of electronic media for transmissions of participant notices and consents under sections 402(f),

³The Treasury Department and IRS have also issued guidance regarding the use of electronic media with respect to tax reporting and other tax requirements with respect to employee benefit plans. For example, Announcement 99-6 (1999-1 C.B. 352) authorizes payers of pensions, annuities, and other employee benefits to establish a system for payees to submit electronically Forms W-4P, Withholding Certificate for Pension or Annuity Payments, W-4S, Request for Federal Income Tax Withholding from Sick Pay, and W-4V, Voluntary Withholding Request, if certain requirements, including signature and recordkeeping requirements, are satisfied. In addition, Notice 2004-10 (2004-1 C.B. 433) authorizes the electronic delivery of certain forms relating to the reporting of contributions and distributions of pensions, simplified employee pensions, traditional IRAs, Roth IRAs, qualified tuition programs, Coverdell education savings accounts, and Archer Medical Savings Accounts. See also §§31.6051-1(j) and 1.6039-1(f).

411(a)(11), and 3405(e)(10)(B) were published in the **Federal Register** (65 FR 6001) on February 8, 2000 (the 2000 regulations). The 2000 regulations set forth standards for the electronic transmission of certain notices and consents that are required in connection with distributions from retirement plans.

Those regulations provide that a plan may provide a notice required under section 402(f), 411(a)(11), or 3405(e)(10)(B) either on a written paper document or through an electronic medium that is reasonably accessible to the participant. In addition, the 2000 regulations provide that any electronic system must be reasonably designed to provide the notice in a manner no less understandable to the participant than a written paper document. Furthermore, the participant must be advised of the right to request and receive a paper copy of the written paper document at no charge, and, upon request, the document must be provided to the participant without charge.

The 2000 regulations also permit an electronic system to satisfy the requirement of section 411(a)(11) that a participant provide written consent to a distribution if certain requirements are satisfied. First, the electronic medium must be reasonably accessible to the participant. Second, the electronic system must be reasonably designed to preclude anyone other than the participant from giving the consent. Third, the system must provide the participant with a reasonable opportunity to review and to confirm, modify, or rescind the terms of the consent before it becomes effective. Fourth, the system must provide the participant, within a reasonable time after the consent is given, a confirmation of the terms (including the form) of the distribution through either a written paper

document or in an electronic format that satisfies the requirements for providing applicable notices. Thus, the participant must be advised of the right to request and to receive a confirmation copy of the consent on a written paper document without charge. The 2000 regulations did not permit the use of electronic media for any notice or election required under section 417 with respect to a waiver of a qualified joint and survivor annuity (QJSA).

The Treasury Department and IRS have issued other guidance applying the standards set forth in the 2000 regulations to other retirement plan notices and elections. For example, §1.7476-2(c)(2) provides that a notice to an interested party is deemed to be provided in a manner that satisfies the delivery requirements of §1.7476-2(c)(1) if the notice is delivered using an electronic medium under a system that satisfies the requirements of §1.402(f)-1, Q&A-5. Q&A-7 of Notice 2000-3 (2000-1 C.B. 413) provides that, until the issuance of further guidance, a plan is permitted to use electronic media to provide notices required under sections 401(k)(12) and 401(m)(11) (relating to safe harbors for section 401(k) and section 401(m) plans) if the employee receives the notice through an electronic medium that is reasonably accessible, the system is designed to provide the notice in a manner no less understandable to the employee than a written paper document, and, at the time the notice is provided, the employee is advised that the employee may request and receive the notice on a written paper document at no charge. Similarly, §1.72(p)-1, Q&A-3(b), requires a loan from a plan to a participant to be set forth in a written paper document, in an electronic medium that satisfies standards that are the same as

the standards in the 2000 regulations, or in such other form as may be approved by the Commissioner. In addition, Notice 99-1 (1999-1 C.B. 269) provides guidance relating to qualified retirement plans permitting the use of electronic media for plan participants or beneficiaries conducting account transactions for which there is no specific writing requirement, such as plan enrollments, direct rollover elections, beneficiary designations, investment change allocations, elective and after-tax contribution designations, and general plan or specific account inquiries.

In 2003, final regulations (TD 9052) under section 4980F were published in the **Federal Register** (68 FR 17277). Under Q&A-13 of §54.4980F-1, for a plan to provide a section 204(h) notice electronically, the section 204(h) notice must actually be received by the applicable individual or the plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the method for providing the section 204(h) notice results in actual receipt. Further, the plan administrator must provide the applicable individual with a clear and conspicuous statement that the individual has a right to receive a paper version of the section 204(h) notice without the imposition of fees and, if the individual requests a paper copy of the section 204(h) notice, the paper copy must be provided without charge. The regulations under section 4980F also provide a safe harbor method for delivering a section 204(h) notice electronically, which is substantially the same as the consumer consent rules of E-SIGN.

The Department of Labor (DOL) and the Pension Benefit Guaranty Corporation (PBGC) have also issued regulations relating to the use of electronic

media to furnish notices, reports, statements, disclosures, and other documents to participants, beneficiaries, and other individuals under titles I and IV of ERISA. See 29 CFR 2520.104b-1 and 29 CFR 4000.14.

On July 14, 2005, a notice of proposed rulemaking (REG-138362-04) under section 401 of the Code was published in the **Federal Register** (70 FR 40675) (the 2005 proposed regulations). On November 2, 2005, the IRS held a public hearing on the proposed regulations. Written comments responding to the notice of proposed rulemaking were also received. Although commentators raised issues with respect to certain provisions in the 2005 proposed regulations, the comments were generally positive. After consideration of all the comments, the 2005 proposed regulations are adopted, as amended by this Treasury Decision. The significant revisions are discussed below.

Explanation of Provisions

I. Overview

A. In General.

This Treasury Decision adds §1.401(a)-21 and modifies a number of existing regulations (including the 2000 regulations and other regulations described above). These regulations set forth the standards by which a retirement plan, an employee benefit arrangement, or an individual retirement plan is permitted to use an electronic medium to provide applicable notices or for individuals in such a plan to make participant elections.

For any requirement under the Code or regulations that an employee benefit notice or election be in writing or in written form, the standards set forth in

these regulations are generally the exclusive rules for providing such communication through the use of an electronic medium. Thus, for example, a retirement plan providing a section 402(f) notice through the use of an electronic medium must satisfy the rules set forth in these regulations.

For any employee benefit notice or election that is not required to be in writing or in written form, the standards set forth in these regulations function as a safe harbor. Thus, a retirement plan, an employee benefit arrangement, or individual retirement plan is permitted to satisfy either these regulations or any other applicable guidance issued by the IRS. For example, with respect to creating an electronic system to accept electronic transmissions of beneficiary designations, a retirement plan is permitted to use the rules under these regulations or continue to follow the standards set forth in Notice 99-1, which is not affected by E-SIGN.

B. Application of Standards.

Like the 2005 proposed regulations, these regulations apply to any notice, election, or similar communication provided to or made by a participant or beneficiary in the following retirement plans: a section 401(a) plan; a section 403(a) plan; a section 403(b) plan; a simplified employee pension (SEP) under section 408(k); a simple retirement plan under section 408(p); and an eligible governmental plan under section 457(b). In response to a comment, these regulations also provide that they apply to any notice, election, or similar communication provided to or made by an individual entitled to benefits in an

individual retirement plan, including a Roth IRA under section 408A or a deemed IRA under section 408(q).

In addition, these final regulations apply to any notice, election, or similar communication provided to or made by a participant or beneficiary under the following employee benefit arrangements: an accident or health plan or arrangement under sections 104(a)(3) or 105; a cafeteria plan under section 125; an educational assistance program under section 127; a qualified transportation fringe program under section 132; an Archer MSA under section 220; and a health savings account under section 223.

These regulations do not apply to any notice, election, consent, disclosure, or obligation required under the provisions of title I or IV of ERISA over which the DOL or the PBGC has interpretative and enforcement authority.⁴ For example, the rules in 29 CFR 2520.104b-1 of the Labor Regulations apply with respect to an employee benefit plan furnishing disclosure documents, such as a summary plan description or a summary annual report. These regulations also do not apply to Code section 411(a)(3)(B) (relating to suspension of benefits), Code section 4980B(f)(6) (relating to an individual's COBRA rights), or any other Code provision over which the DOL or the PBGC has similar interpretative authority.

⁴ See generally Reorganization Plan No. 4 of 1978 (43 FR 47713). Pursuant to section 101(a) of the Reorganization Plan No. 4 of 1978, 29 U.S.C. 1001nt, the Secretary of the Treasury has authority to issue regulations under parts 2 and 3 of subtitle B of title I of ERISA with certain exceptions. Under section 104 of the Reorganization Plan No. 4, the Secretary of Labor retains enforcement authority with respects to parts 2 and 3 of subtitle B of title 1 of ERISA, but, in exercising that authority, is bound by the regulations issued by the Secretary of Treasury.

In addition, the rules in these regulations apply only with respect to notices and elections relating to an individual's rights under a retirement plan, an employee benefit arrangement, or an individual retirement plan. Thus, these regulations do not apply with respect to other requirements under the Code, such as requirements relating to tax reporting, tax records, or substantiation of expenses.⁵

C. Requirements for Using Electronic Media to Provide Notices and Make Elections.

These final regulations generally retain from the 2005 proposed regulations the requirement that any communication that is provided using an electronic medium satisfy all the otherwise applicable requirements (including the applicable timing and content rules) relating to that communication. Thus, for example, a section 204(h) notice provided using an electronic medium must be delivered on or before the time period required under Q&A-9 of §54.4980F-1, must satisfy the content requirements set forth in Q&A-11 of §54.4980F-1, and must satisfy the delivery requirements under these regulations.

These regulations provide that an electronic system used to provide a notice or to make an election must satisfy certain requirements. First, with respect to the content of an applicable notice, the electronic system must be reasonably designed to provide the information to a recipient in a manner no less

⁵Code section 6001 provides rules relating to the maintenance of records, statements, and special returns. The IRS has issued guidance on electronic recordkeeping under section 6001. This guidance applies to retirement plans, employee benefits plans, and individual retirement plans. Rev. Proc. 98-25 (1998-1 C.B. 689) sets forth standards for a taxpayer maintaining records on an Automated Data Processing system. Under section 3.01 of Rev. Proc. 98-25, those standards apply to employee plans. Rev. Proc. 97-22 (1997-1 C.B. 652) provides guidance to taxpayers using an electronic storage system to maintain books and records required under section 6001. Under section 3.02 of Rev. Proc. 97-22, those requirements apply to employee plans. See also footnote 3 above.

understandable to the recipient than if provided on a written paper document. For example, a plan delivering a lengthy section 402(f) notice would not satisfy this requirement if the plan chose to provide the notice through a pre-recorded message on an automated phone system.⁶ However, a plan with few distribution options is permitted to provide a section 411(a)(11) notice through the use of a pre-recorded message on an automated phone system. Second, the regulations require that the electronic system be reasonably designed to alert the recipient, at the time the applicable notice is provided, to the significance of the information in the notice (including the identification of the subject matter of the notice), and provide any instructions needed to access the notice, in a manner that is as readily understandable and accessible as an applicable notice provided using a written paper document. These requirements are necessary in order for the notice to fulfill their intended purpose, are substantially equivalent to the requirements imposed on nonelectronic notices, and do not impose unreasonable costs on the acceptance or use of electronic records. Moreover, they do not require or accord greater legal status to a particular technology since each technology must satisfy the same standards with respect to each notice. Third, the final regulations clarify that, pursuant to section 101(e) of E-SIGN, if an electronic record of an applicable notice or a participant election is not maintained in a form that is capable of being retained and accurately reproduced for later reference, then the legal effect, validity, or enforceability of such electronic record may be denied.

⁶ Note that a section 204(h) notice cannot be provided using oral communication or a recording of an oral communication. See §54.4980F-1, A-13(c)(1).

II. Use of an Electronic Medium to Provide an Applicable Notice.

A. Two Methods for Providing Applicable Notices. These regulations provide two methods by which a retirement plan, employee benefit arrangement, or an individual retirement plan is permitted to provide an applicable notice to a recipient through the use of an electronic medium. Under the first method, an applicable notice is permitted to be provided to a recipient using an electronic medium after the recipient consents to the electronic delivery of the notice (the consumer consent method). The rules under the consumer consent method reflect the consumer consent requirements at section 101(c) in E-SIGN. The Treasury Department and IRS continue to believe that an individual entitled to benefits under a retirement plan, an employee benefit arrangement, or an individual retirement plan is generally a consumer, within the meaning of section 106(1) of E-SIGN, when receiving a notice that could affect the individual's benefits or other rights.⁷ The second method (the alternative method) provides rules that are intended generally to replicate the requirements in the 2000 regulations that apply to notices required under sections 402(f), 411(a)(11), and 3405, and thereby allow plans to continue to provide these notices electronically using electronic systems that satisfy the standards in the 2000 regulations.

B. Consumer Consent Method for Providing Applicable Notices.

Under the consumer consent method, before an applicable notice is provided to a recipient using an electronic medium, the participant must consent to receive the communication electronically. The consent generally must be

⁷ See also 12 CFR 202.16, 205.17, 213.6, and 2226.36, treating electronic disclosures in connection with certain credit transactions as consumer information for purposes of E-SIGN.

made in a manner that reasonably demonstrates that the participant can access the notice in the electronic form that will be used to provide the notice.

Alternatively, the consent may be made using a written paper document, but only if the participant confirms the consent in a manner that reasonably demonstrates that the participant can access the notice in the electronic form to be provided.

Prior to consenting, the participant must receive a disclosure statement that outlines the scope of the consent, the participant's right to withdraw his or her consent to receive the communication electronically (including any conditions, consequences, or fees in the event of the withdrawal), and the right to receive the communication using paper and any fees imposed for receiving paper. The disclosure must also specify the hardware and software requirements for accessing the electronic media and the procedures for updating information to contact the participant electronically. In the event the hardware or software requirements change, new consent must be obtained from the participant, generally following the rules of section 101(c) of E-SIGN. In addition, under the consumer consent method, the applicable notice cannot be provided through the use of oral communication or a recording of an oral communication.⁸

Commentators requested several modifications to the rules under the consumer consent method in these regulations, including requiring plans to give recipients the opportunity to review their consumer consent elections every five years and permitting plans to use oral communications or recordings of oral communications when providing applicable notices under the consumer consent rules. Other commentators recommended that the regulations be revised to

⁸ See section 101(c)(6) of E-SIGN.

provide that, under the consumer consent method, if a participant does not have the effective ability to access the electronic medium used to provide an applicable notice or if the participant does not consent to receive the notice through the use of an electronic medium, such participant would have the right to a free paper copy of the notice.

The consumer consent method under these regulations interprets the rules of section 101(c) of E-SIGN, and section 104(b)(2) of E-SIGN restricts an agency's ability to interpret E-SIGN in any manner that is inconsistent with section 101 of E-SIGN or that adds to the requirements of that section. Accordingly, the rules under the consumer consent method of these final regulations are retained without substantive change. However, many of the issues raised by the commentators are ameliorated by the availability of the alternative method for providing applicable notices, as discussed below in Alternative Method for Providing Applicable Notices.

C. Alternative Method for Providing Applicable Notices.

These regulations exempt applicable notices from the consumer consent requirements of E-SIGN and provide an alternative method of complying with the requirement that an applicable notice be in writing or in written form if certain conditions are satisfied. This alternative method of compliance, which is based on the 2000 regulations previously issued under section 1510 of TRA '97, satisfies the requirements of section 104(d)(1) of E-SIGN, including the requirement that any exemption from the consumer consent requirements not increase the material risk of harm to consumers.

This exemption is based on the judgment that, if the consumer consent method were the only method available to satisfy the requirements for providing an applicable notice through the use of an electronic medium, it would impose a substantial burden on electronic commerce with respect to retirement plans, employee benefit arrangements, and individual retirement plans, and that the requirements and safeguards in the 2000 regulations provide a less burdensome method without increasing the material risk of harm to recipients.

Under the alternative method, at the time the applicable notice is provided, the recipient must be advised that he or she may request and receive the applicable notice in writing on paper at no charge. In addition, any recipient of the notice must be “effectively able” to access the electronic medium used to provide the notice. This is a change in wording from the 2000 regulations, which required that the electronic medium be “reasonably accessible” to the recipient. As explained in the preamble to the 2005 proposed regulations, this change is not intended to reflect a substantive change in the rules, but rather to avoid confusion with Department of Labor Regulations interpreting the words reasonably accessible as used in section 101(i)(2)(D) of ERISA, as added by section 306 of the Sarbanes-Oxley Act of 2002, Public Law 107-204 (116 Stat. 745).⁹

⁹ Section 101(i) of ERISA sets forth a requirement for a plan administrator to notify plan participants and beneficiaries of a blackout period with respect to an individual account plan. Section 101(i)(2)(D) provides that the required blackout notice “shall be in writing, except that such notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.” Section 2520.101-3(b)(3) of the Labor Regulations interpreting this requirement provides for this notice to be in writing and furnished in any manner consistent with the requirements of section 2520.104b-1 of the Labor Regulations, including the provisions in that section relating to the use of electronic media. Those regulations also deem a notice requirement to be satisfied if certain measures are taken. Section 1.401(a)-21 of these final regulations only

One commentator requested that the regulations provide a rule under which an e-mail sent to the last known e-mail address would be deemed to have been successfully delivered. These regulations do not include such a rule.

III. Use of an Electronic Medium to Make a Participant Election.

A. In General.

These regulations also set forth the requirements that apply if a consent or election is made by a person using an electronic system. The participant election rules, which are also based on the standards in the 2000 regulations, generally retain the requirements that (1) the participant be effectively able to access the electronic medium in order to make the participant election, (2) the electronic system be reasonably designed to preclude any person other than the appropriate individual from making a participant election, (3) the electronic system provide the participant making a participant election with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election before it becomes effective, and (4) the individual making a participant election, within a reasonable time period, receive a confirmation of the election through either a written paper document or an electronic medium under a system that satisfies the applicable notice requirements of either the consumer consent delivery method or the alternative delivery method. Section 101(c) of E-SIGN does not apply to participant elections.

These regulations require that a participant be effectively able to access the electronic medium under an electronic system used to make a participant

provides rules for satisfying, through the use of electronic media, a requirement that a notice or election be in writing.

election, but, like the 2000 regulations, do not require that a plan also permit the election to be made by paper as an alternative to using an electronic system that is available to the participant. However, these regulations do not apply with respect to a participant who is not effectively able to access the electronic medium or media in order to make a participant election. Accordingly, the plan must offer each such participant the right to make an election in another medium that is accessible to the participant (such as a paper election). A plan that fails to offer paper or an electronic medium that a participant is effectively able to access will fail to comply with the participant election requirements and would likely violate other qualification requirements, such as the requirements that a plan to operate in accordance with its terms (by actually making available all distribution options provided by the plan) and the requirements of §1.401(a)(4)-4 under which benefits, rights, and features (including the right to early distribution) must be made available in a nondiscriminatory manner.

B. Use of Electronic Media for QJSA Notices and Elections.

The participant election rules in these regulations extend the use of electronic media to the notice and election rules applicable to plans that are subject to the QJSA requirements of section 417. Accordingly, a plan subject to the QJSA requirements is permitted to provide the notice required by section 417 to a participant through the use of electronic media as long as the plan complies with either of the two methods described above for providing electronic notices. Similarly, a participant's consent to a distribution is permitted to be provided

through the use of electronic media if the plan complies with the standards described below, subject to obtaining a valid spousal consent.

Section 417 requires any spousal consent to a waiver of a QJSA to be witnessed by a plan representative or a notary public. In accordance with section 101(g) of E-SIGN, these regulations authorize the use of an electronic acknowledgment or notarization if the standards of section 101(g) of E-SIGN and State law applicable to notary publics are satisfied. These regulations retain the requirement from the 2005 proposed regulations that the signature of a spouse be witnessed in the physical presence of the plan representative or notary public. Several comments were received on the participant election rules, particularly as they relate to spousal consents. The comments generally fall into two categories: (1) commentators who favored retaining the pen-and-ink signature and physical presence requirements for spousal consents; and (2) commentators who favored extending the use of electronic media to spousal consents, and eliminating the physical presence requirement.

Commentators in the first category raised issues with rules in the 2005 proposed regulations relating to the authentication requirement and the requirement that a spousal consent of a waiver of a QJSA be witnessed in the physical presence of a notary public or a plan representative. In general, these commentators recommended that the regulations be revised to provide additional safeguards for spousal consents because, unlike other participant elections, a spousal consent could involve a conflict of interest between the parties involved in the election. With respect to the authentication requirement, these

commentators argued that the authentication requirement would be vague and not require an evidentiary record. According to the commentators, requiring a pen-and-ink signature and maintaining the physical presence requirement would provide necessary additional safeguards for spousal consents by creating an evidentiary record for later disputes regarding the validity of the consent and reducing the likelihood of fraud.

Commentators who favored extending the use of electronic media for all participant elections, including spousal consents, generally recommended that the final regulations eliminate the physical presence requirement for spousal consents. These commentators argued that protections are already available to protect a spouse making a participant election using electronic media. For example, a retirement plan could require a separate PIN for the spouse to which the participant would not have access.

In light of these comments, these regulations clarify that the determination of whether an electronic system used in making participant elections is reasonably designed to preclude any person other than the appropriate individual from making a participant election is based on facts and circumstances, and that a relevant factor is whether the participant election has the potential for a conflict of interest between the individuals involved in the election. See Example 3 in §1.401(a)-21(f) of these regulations for an illustration of the participant election rules when a spousal consent is required. These regulations also clarify that if an applicable notice or participant election is recorded electronically, the electronic record must be in a form that is capable of being reproduced for later

reference (see discussion of the general rules under the heading Requirements for Using Electronic Media to Provide Notices and Make Elections).

The requirement that the signature of a spouse to be witnessed in the physical presence of a plan representative or notary public coordinates with the authentication requirement because the physical presence requirement increases the likelihood that the electronic system is reasonably designed to preclude any person other than the appropriate individual from making the election. In contrast, an electronic system that permits the use of a spousal PIN to sign a spousal consent electronically creates greater risk that the spousal consent may be fraudulently signed. Because of the potential risk that two spouses could share information regarding PINs, the Treasury Department and IRS believe that any electronic system that relies solely on separate PINs would not provide the same level of safeguards as provided by the physical presence requirement and would not be reasonably designed to preclude any person other than the appropriate individual from making the election. Accordingly these regulations do not adopt the suggestion that spousal PINs be permitted in lieu of the physical presence requirement, and instead retain from the 2005 proposed regulations the physical presence requirement for electronic notarization of spousal consents. The Treasury Department and IRS believe that permitting electronic notarization of spousal consents under the participant election rules, in conjunction with the physical presence requirement, reflects the appropriate interpretation of section 417 and properly balances minimizing the burden of plan administration with protecting the rights of spouses.

Technology is constantly evolving and, at some point in the future, technology could exist that would provide the same safeguards as the physical presence requirement. Therefore, in light of the comments received, these regulations add a delegation to the Commissioner. Under this delegation, the Commissioner may provide that the use of procedures under an electronic system with respect to an electronic medium is deemed to satisfy the physical presence requirement, but only if those procedures with respect to the electronic system provide the same safeguards for participant elections as provided through the physical presence requirement.

C. Conforming Amendments to Other Rules in Law

These regulations modify a number of existing regulations (including the 2000 regulations) that have previously provided rules relating to the use of new technologies in providing applicable notices or making participant elections that are required to be in writing or in written form. These modifications, which merely add the consumer consent requirements of E-SIGN, are not expected to affect adversely the existing administrative practices of plan sponsors designed to comply with the 2000 regulations.

In addition, these regulations apply to categories of applicable notices that were not previously addressed in the 2000 regulations or subsequent regulations. As such, these regulations apply whenever there is a requirement that an applicable notice under one of the covered sections be provided in written form or in writing, without regard to whether that other requirement specifically cross-references these regulations. Thus, safe harbor notices under

sections 401(k)(12)(D) and 401(m)(11), which are required to be in writing, can be provided electronically if the requirements of section 1.401(a)-21 of this chapter are satisfied.

Effective Date

The rules provided in § 1.401(a)-21 apply to applicable notices provided, and to participant elections made, on or after January 1, 2007. However, a retirement plan, an employee benefit arrangement, or an individual retirement plan that provides an applicable notice or makes a participant election that complies with the requirements set forth in these regulations on or after October 1, 2000, and before January 1, 2007, will not be treated as failing to provide an applicable notice or to make a participant election merely because the notice or election was not in writing or written form.

Special Analyses

It has been determined that this Treasury Decision is not a significant regulatory action as defined in Executive Order 12866. Therefore a regulatory assessment is not required. It has also been determined that the provisions of 5 U.S.C. 553(b) and (d) do not apply to this Treasury Decision. It is hereby certified that the collection of information in these regulations will not have a significant impact on a substantial number of small entities. This certification is based on the fact that these regulations only provide guidance on how to satisfy existing collection of information requirements through the use of electronic media. Accordingly, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the NPRM preceding this regulation was submitted

to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Pamela R. Kinard of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 35

Employment taxes, Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 35, and 54 are amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.401(a)-21 also issued under 26 U.S.C. 401 and section 104 of the Electronic Signatures in Global and National Commerce Act, Public Law 106-229 (114 Stat. 464). * * *

Par. 2. Section 1.72(p)-1, Q&A-3, is amended by revising the text of paragraph (b) to read as follows:

§1.72(p)-1 Loans treated as distributions.

* * * * *

A-3. * * *

(b) * * * A loan does not satisfy the requirements of this paragraph unless the loan is evidenced by a legally enforceable agreement (which may include more than one document) and the terms of the agreement demonstrate compliance with the requirements of section 72(p)(2) and this section. Thus, the agreement must specify the amount and date of the loan and the repayment schedule. The agreement does not have to be signed if the agreement is enforceable under applicable law without being signed. The agreement must be set forth either--

(1) In a written paper document; or

(2) In a document that is delivered through an electronic medium under an electronic system that satisfies the requirements of §1.401(a)-21 of this chapter.

* * * * *

Par. 3. Section 1.132-9(b), Q&A-12, is amended by adding a sentence to the end of the text in paragraph (b) to read as follows:

§1.132-9 Qualified transportation fringes.

* * * * *

A-12. * * *

(b) * * * See §1.401(a)-21 of this chapter for rules permitting the use of electronic media to make participant elections with respect to employee benefit arrangements.

* * * * *

Par. 4. Section 1.401(a)-21 is added to read as follows:

§1.401(a)-21 Rules relating to the use of an electronic medium to provide applicable notices and to make participant elections.

(a) Introduction--(1) In general--(i) Permission to use an electronic medium. This section provides rules relating to the use of an electronic medium to provide applicable notices and to make participant elections as defined in paragraph (e)(1) and (6) of this section with respect to retirement plans, employee benefit arrangements, and individual retirement plans described in paragraph (a)(2) of this section. The rules in this section reflect the provisions of the Electronic Signatures in Global and National Commerce Act, Public Law 106-229 (114 Stat. 464 (2000) (E-SIGN)).

(ii) Notices and elections required to be in writing or in written form--(A) In general. The rules of this section must be satisfied in order to use an electronic medium to provide an applicable notice or to make a participant election if the notice or election is required to be in writing or in written form under the Internal

Revenue Code, Department of Treasury regulations, or other guidance issued by the Commissioner.

(B) Rules relating to applicable notices. An applicable notice that is provided using an electronic medium is treated as being provided in writing or in written form if and only if the requirements of paragraph (a)(5) of this section are satisfied and either the consumer consent requirements of paragraph (b) of this section or the requirements for exemption from the consumer consent requirements under paragraph (c) of this section are satisfied. For example, in order to provide a section 402(f) notice electronically, a qualified plan must satisfy either the consumer consent requirements of paragraph (b) of this section or the requirements for exemption under paragraph (c) of this section. If a plan fails to satisfy either of these requirements, the plan must provide the section 402(f) notice using a written paper document in order to satisfy the requirements of section 402(f).

(C) Rules relating to participant elections. A participant election that is made using an electronic medium is treated as being provided in writing or in written form if and only if the requirements of paragraphs (a)(5) and (d) of this section are satisfied.

(iii) Safe harbor method for applicable notices and participant elections that are not required to be in writing or written form. For an applicable notice or a participant election that is not required to be in writing or in written form, the rules of this section provide a safe harbor method for using an electronic medium to provide the applicable notice or to make the participant election.

(2) Application of rules--(i) Notices, elections, or consents under retirement plans. The rules of this section apply to any applicable notice or any participant election relating to the following retirement plans: a qualified retirement plan under section 401(a) or 403(a); a section 403(b) plan; a simplified employee pension (SEP) under section 408(k); a simple retirement plan under section 408(p); or an eligible governmental plan under section 457(b).

(ii) Notices, elections, or consents under other employee benefit arrangements. The rules of this section also apply to any applicable notice or any participant election relating to the following employee benefit arrangements: an accident and health plan or arrangement under sections 104(a)(3) and 105; a cafeteria plan under section 125; an educational assistance program under section 127; a qualified transportation fringe program under section 132; an Archer MSA under section 220; or a health savings account under section 223.

(iii) Notices, elections, or consents under individual retirement plans. The rules of this section also apply to any applicable notice or any participant election relating to individual retirement plans, including a Roth IRA under section 408A; or a deemed IRA under a qualified employer plan described in section 408(q).

(3) Limitation on application of rules--(i) In general. The rules of this section do not apply to any notice, election, consent, disclosure, or obligation required under the provisions of title I or IV of the Employee Retirement Income Security Act of 1974, as amended (ERISA), over which the Department of Labor or the Pension Benefit Guaranty Corporation has interpretative and enforcement authority. For example, the rules in 29 CFR 2520.104b-1 of the Department of

Labor Regulations apply with respect to an employee benefit plan providing disclosure documents, such as a summary plan description or a summary annual report. The rules in this section also do not apply to Internal Revenue Code section 411(a)(3)(B) (relating to suspension of benefits), Internal Revenue Code section 4980B(f)(6) (relating to an individual's COBRA rights), or any other Internal Revenue Code provision over which Department of Labor or the Pension Benefit Guaranty Corporation has similar interpretative authority.

(ii) Recordkeeping and other requirements. The rules in this section only apply with respect to applicable notices and participant elections relating to an individual's rights under a retirement plan, an employee benefit arrangement, or an individual retirement plan. Thus, the rules in this section do not alter the otherwise applicable requirements under the Internal Revenue Code, such as the requirements relating to tax reporting, tax records, or substantiation of expenses. See section 6001 for rules relating to the maintenance of records, statements, and special returns. See also section 101(e) of E-SIGN, which provides that if an electronic record of an applicable notice or a participant election is not maintained in a form that is capable of being retained and accurately reproduced for later reference, then the legal effect, validity, or enforceability of such electronic record may be denied.

(4) General requirements related to applicable notices and participant elections. The rules of this section supplement the general requirements related to each applicable notice and participant election. Thus, in addition to satisfying the rules for timing and content, the rules in this section must be satisfied.

(5) Requirements related to the design of an electronic system used to deliver applicable notices and to make participant elections--(i) The electronic system must take into account the content of a notice. With respect to the content of an applicable notice, the electronic system must be reasonably designed to provide the information in the notice to a recipient in a manner that is no less understandable to the recipient than a written paper document.

(ii) Identification of the significance of information in the notice. The electronic system must be designed to alert the recipient, at the time an applicable notice is provided, to the significance of the information in the notice (including identification of the subject matter of the notice), and provide any instructions needed to access the notice, in a manner that is readily understandable.

(b) Consumer consent requirements--(1) Requirements. With respect to an applicable notice, the consumer consent requirements of this paragraph (b) are satisfied if --

(i) The requirements in paragraphs (b)(2) through (4) of this section are satisfied; and

(ii) In accordance with section 101(c)(6) of E-SIGN, the applicable notice is not provided through the use of oral communication or a recording of an oral communication.

(2) Consent--(i) In general. The recipient must affirmatively consent to the delivery of the applicable notice using an electronic medium. This consent must be either--

(A) Made electronically in a manner that reasonably demonstrates that the recipient can access the applicable notice in the electronic medium in the form that will be used to provide the notice; or

(B) Made using a written paper document (or using another form not described in paragraph (b)(2)(i)(A) of this section), but only if the recipient confirms the consent electronically in a manner that reasonably demonstrates that the recipient can access the applicable notice in the electronic medium in the form that will be used to provide the notice.

(ii) Withdrawal of consumer consent. The consent to receive electronic delivery requirement of this paragraph (b)(2) is not satisfied if the recipient withdraws his or her consent before the applicable notice is delivered.

(3) Required disclosure statement. The recipient, prior to consenting under paragraph (b)(2)(i) of this section, must be provided with a clear and conspicuous statement containing the disclosures described in paragraphs (b)(3)(i) through (v) of this section:

(i) Right to receive paper document--(A) In general. The statement informs the recipient of any right to have the applicable notice be provided using a written paper document or other nonelectronic form.

(B) Post-consent request for paper copy. The statement informs the recipient how, after having provided consent to receive the applicable notice electronically, the recipient may, upon request, obtain a paper copy of the applicable notice and whether any fee will be charged for such copy.

(ii) Right to withdraw consumer consent. The statement informs the recipient of the right to withdraw consent to receive electronic delivery of an applicable notice on a prospective basis at any time and explains the procedures for withdrawing that consent and any conditions, consequences, or fees in the event of the withdrawal.

(iii) Scope of the consumer consent. The statement informs the recipient whether the consent to receive electronic delivery of an applicable notice applies only to the particular transaction that gave rise to the applicable notice or to other identified transactions that may be provided or made available during the course of the parties' relationship. For example, the statement may provide that a recipient's consent to receive electronic delivery will apply to all future applicable notices of the recipient relating to the employee benefit arrangement until the recipient is no longer a participant in the employee benefit arrangement (or withdraws the consent).

(iv) Description of the contact procedures. The statement describes the procedures to update information needed to contact the recipient electronically.

(v) Hardware or software requirements. The statement describes the hardware and software requirements needed to access and retain the applicable notice.

(4) Post-consent change in hardware or software requirements. If, after a recipient provides consent to receive electronic delivery, there is a change in the hardware or software requirements needed to access or retain the applicable

notice and such change creates a material risk that the recipient will not be able to access or retain the applicable notice in electronic format--

(i) The recipient must receive a statement of--

(A) The revised hardware or software requirements for access to and retention of the applicable notice; and

(B) The right to withdraw consent to receive electronic delivery without the imposition of any fees for the withdrawal and without the imposition of any condition or consequence that was not previously disclosed in paragraph (b)(3) of this section; and

(ii) The recipient must reaffirm consent to receive electronic delivery in accordance with the requirements of paragraph (b)(2) of this section.

(c) Exemption from consumer consent requirements--(1) In general. This paragraph (c) is satisfied if the conditions in paragraphs (c)(2) and (3) of this section are satisfied. This paragraph (c) constitutes an exemption from the consumer consent requirements of section 101(c) of E-SIGN pursuant to the authority granted in section 104(d)(1) of E-SIGN.

(2) Effective ability to access. For purposes of this paragraph (c), the electronic medium used to provide an applicable notice must be a medium that the recipient has the effective ability to access.

(3) Free paper copy of applicable notice. At the time the applicable notice is provided, the recipient must be advised that he or she may request and receive the applicable notice in writing on paper at no charge, and, upon request, that applicable notice must be provided to the recipient at no charge.

(d) Special rules for participant elections--(1) In general. This paragraph (d) is satisfied if the conditions described in the following paragraphs (d)(2) through (6) are satisfied:

(2) Effective ability to access. The electronic medium under an electronic system used to make a participant election must be a medium that the person who is eligible to make the election is effectively able to access. If the appropriate individual is not effectively able to access the electronic medium for making the participant election, the participant election will not be treated as made available to that individual. Thus, for example, the participant election will not be treated as made available to that individual for purposes of the rules under section 401(a)(4).

(3) Authentication. The electronic system used in making participant elections is reasonably designed to preclude any person other than the appropriate individual from making the election. Whether this condition is satisfied is based on facts and circumstances, including whether the participant election has the potential for a conflict of interest between the individuals involved in the election. See Examples 3, 4, and 5 of paragraph (f) of this section for illustrations of electronic systems that satisfy the authentication requirement of this paragraph (d)(3).

(4) Opportunity to review. The electronic system used in making participant elections provides the person making the participant election with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election before the election becomes effective.

(5) Confirmation of action. The person making the participant election receives, within a reasonable time, a confirmation of the effect of the election under the terms of the plan or arrangement through either a written paper document or an electronic medium under a system that satisfies the requirements of either paragraph (b) or (c) of this section (as if the confirmation were an applicable notice).

(6) Participant elections, including spousal consents, that are required to be witnessed by a plan representative or a notary public--(i) In general. In the case of a participant election which is required to be witnessed by a plan representative or a notary public (such as a spousal consent under section 417), the signature of the individual making the participant election is witnessed in the physical presence of a plan representative or a notary public.

(ii) Electronic notarization permitted. If the requirements of paragraph (d)(6)(i) of this section are satisfied, an electronic notarization acknowledging a signature (in accordance with section 101(g) of E-SIGN and state law applicable to notary publics) will not be denied legal effect if the signature of the individual is witnessed in the physical presence of a notary public.

(iii) Delegation to Commissioner. In guidance published in the Internal Revenue Bulletin, the Commissioner may provide that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement under paragraph (d)(6)(i) of this section, but only if those procedures with respect to the electronic system provide the same safeguards for participant

elections as are provided through the physical presence requirement. See § 601.601(d)(2)(ii)(b) of this chapter.

(e) Definitions. The definitions in this paragraph (e) apply for purposes of this section.

(1) Applicable notice. The term applicable notice includes any notice, report, statement, or other document required to be provided to a recipient under a retirement plan, employee benefit arrangement, or individual retirement plan as described in paragraph (a)(2) of this section.

(2) Electronic. The term electronic means technology having electrical, digital, magnetic, wireless, optical, electromagnetic, voice-recording systems, or similar capabilities.

(3) Electronic medium. The term electronic medium means an electronic method of communication (e.g., website, electronic mail, telephonic system, magnetic disk, and CD-ROM).

(4) Electronic record. The term electronic record means an applicable notice or a participant election that is created, generated, sent, communicated, received, or stored by electronic media.

(5) Electronic system. The term electronic system means a system designed for creating, generating, sending, receiving, storing, retrieving, displaying, or processing information that makes use of any electronic medium.

(6) Participant election. The term participant election includes any consent, election, request, agreement, or similar communication made by or from a participant, beneficiary, alternate payee, or an individual entitled to benefits

under a retirement plan, employee benefit arrangement, or individual retirement plan as described in paragraph (a)(2) of this section.

(7) Recipient. The term recipient means a plan participant, beneficiary, employee, alternate payee, or any other person to whom an applicable notice is to be provided.

(f) Examples. The following examples illustrate the rules of this section. Examples 1, 2, 3, and 6 assume that the requirements of paragraph (a)(4) and (5) of this section are satisfied.

Example 1. (i) Facts involving using the consumer consent requirements to deliver a section 402(f) notice via e-mail. Plan A, a qualified plan, permits participants to request benefit distributions from the plan on Plan A's Internet website. Under Plan A's system for such transactions, a participant must enter his or her account number, personal identification number (PIN), and his or her e-mail address to which the notice is to be sent. The participant's PIN and account number must match the information in Plan A's records in order for the transaction to proceed. Participant H requests a distribution from Plan A on Plan A's website, and, at the time of the request for distribution, a disclosure statement appears on the computer screen that explains that Participant H can consent to receive the section 402(f) notice electronically. The disclosure statement provides information relating to the consent, including how to receive a paper copy of the notice, how to withdraw consent, the hardware and software requirements, and the procedures for accessing the section 402(f) notice, which is in a file format from a specific spreadsheet program. After reviewing the disclosure statement, which satisfies the requirements of paragraph (b)(3) of this section, Participant H consents to receive the section 402(f) notice via e-mail by selecting the consent button at the end of the disclosure statement. As a part of the consent procedure, an e-mail is sent to Participant H's e-mail address in order to demonstrate that Participant H can access the spreadsheet program. In the e-mail, Participant H is prompted to answer a question from the spreadsheet program, which is in an attachment to the e-mail. Once Participant H correctly answers the question, the section 402(f) notice is then delivered to Participant H via e-mail.

(ii) Conclusion. In this Example 1, Plan A's delivery of the section 402(f) notice to Participant H satisfies the requirements of paragraph (b) of this section.

Example 2. (i) Facts--(A) Facts involving using the alternative method to deliver a section 411(a)(11) notice via e-mail. Plan B, a qualified plan, permits

participants to request benefit distributions from the plan on Plan B's Internet website. Under Plan B's system for such transactions, a participant must enter his or her account number and personal identification number (PIN), and his or her e-mail address to which the notice is to be sent. The participant's PIN and account number must match the information in Plan B's records in order for the transaction to proceed. After Participant K, a single employee, requests a distribution from Plan B on Plan B's Internet website, the plan administrator provides Participant K with a section 411(a)(11) notice in an attachment to an e-mail. Plan B sends the e-mail with a request for a computer generated notification that the message was received and opened. The e-mail instructs Participant K to read the attachment for important information regarding the request for a distribution. In addition, the e-mail also states that Participant K may request the section 411(a)(11) notice on a written paper document and that, if Participant K requests the notice on a written paper document, it will be provided at no charge. Plan B receives notification indicating that the e-mail was received and opened by Participant K.

(B) Facts involving making a participant's consent to a distribution. In order to consent to a distribution, Plan B requires a participant to enter the participant's account number and PIN in order to preclude any person other than the participant from making the election. After the authentication process, Participant K completes a distribution request form on the website. After completing the request form, the website provides a summary of the information entered on the form and gives Participant K an opportunity to review or modify the distribution request form before the transaction is completed. Within a reasonable period of time after Participant K consents to the distribution, the plan administrator, by e-mail, sends confirmation of the terms (including the form) of the distribution to Participant K and advises Participant K that, upon request, the confirmation may be provided to Participant K on a written paper document at no charge. Plan B retains an electronic copy of the consent to the distribution in a form that is capable of being retained and accurately reproduced for later reference by Participant K.

(ii) Conclusion. In this Example 2, Plan B's delivery of the section 411(a)(11) notice and the electronic system used to make Participant K's consent to a distribution satisfy the requirements of paragraphs (a), (c), and (d) of this section.

Example 3. (i) Facts involving the transmission of a spousal consent via electronic notarization. Plan C, a qualified money purchase pension plan, permits a married participant to request a plan loan through the Plan C's Internet website with the notarized consent of the spouse. Under Plan C's system for requesting a plan loan, a participant must enter his or her account number, personal identification number (PIN), and his or her e-mail address. The information entered by the participant must match the information in Plan C's records in order for the transaction to proceed. Participant M, a married

participant, is effectively able to access the website available to apply for a plan loan. In order to apply for a loan, Plan C requires a participant to enter the participant's account number and PIN in order to preclude any person other than the participant from making the election. Participant M completes the loan application on Plan C's website. Within a reasonable period of time after submitting the plan loan application, the plan administrator, by e-mail, sends Participant M the loan application, including all attachments setting forth the terms of the loan agreement and all other required information. In the e-mail, Plan C also notifies Participant M that, upon request, the loan application may be provided to Participant M on a written paper document at no charge. Plan C then instructs Participant M that, in order for the loan application to proceed, Participant M must submit to the plan administrator a notarized spousal consent form. Participant M and M's spouse go to a notary public and the notary witnesses Participant M's spouse signing the spousal consent for the loan agreement on an electronic signature capture pad with adequate security. After witnessing M's spouse signing the spousal consent, the notary public sends an e-mail with an electronic acknowledgement that is attached to or logically associated with the signature of M's spouse to the plan administrator. The electronic acknowledgement is in accordance with section 101(g) of E-SIGN and the relevant state law applicable to notary publics. After the plan receives the e-mail, Plan C sends an e-mail to Participant M, giving M a reasonable period to review and confirm the completed loan application and to determine whether the loan application should be modified or rescinded. In addition, the e-mail to Participant M also provides that M may request the completed loan application on a written paper document and that, if M requests the written paper document, it will be provided at no charge. Plan C retains an electronic copy of the loan agreement, including the spousal consent, in a form that is capable of being retained and accurately reproduced for later reference by all parties.

(ii) Conclusion. In this Example 3, the transmission of the plan loan agreement satisfies the requirements of paragraphs (a), (c), and (d) of this section. By requiring that the spouse sign the spousal consent on an electronic signature capture pad in the physical presence of a notary public, the electronic system satisfies the requirement that the system be reasonably designed to preclude any person other than the appropriate individual from making the election. Thus, the electronic notarization of spousal consent satisfies the requirements of paragraphs (a) and (d) of this section.

Example 4. (i) Facts--(A) Facts involving using the alternative method of compliance to deliver a section 411(a)(11) notice via an automated telephone system. A qualified profit-sharing plan (Plan D) permits participants to request distributions through an automated telephone system. Under Plan D's system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match the information in Plan D's records in order for the transaction to proceed. Plan D provides only the following distribution options: single-sum payment; and annual installments

over 5, 10, or 20 years. Participant N, a single participant, requests a distribution from Plan D by following the applicable instructions on the automated telephone system. After Participant N has requested the distribution, the automated telephone system recites the section 411(a)(11) notice over the phone. The automated telephone system also advises Participant N that, upon request, the notice may be provided on a written paper document and that, if Participant N so requests, the notice will be provided on a written paper document at no charge.

(B) Facts involving making a participant's consent to a distribution via an automated telephone system. In order to consent to a distribution, Plan D requires a participant to enter the participant's account number and PIN in order to preclude any person other than the participant from making the election. Participant N requests a distribution by entering information on the automated telephone system. After completing the request, the automated telephone system provides a oral summary of the information entered and gives Participant N an opportunity to review or modify the distribution request before the transaction is completed. Plan D's automated telephone system confirms the distribution request to Participant N and advises Participant N that, upon request, a confirmation may be provided on a written paper document at no charge. Plan D retains an electronic copy of the consent to the distribution in a form that is capable of being retained and accurately reproduced for later reference by Participant N.

(ii) Conclusion. In this Example 4, because Plan D has relatively few and simple distribution options, the provision of the section 411(a)(11) notice through the automated telephone system is no less understandable to the participant than a written paper notice for purposes of paragraph (a)(5)(i) of this section. In addition, the automated telephone procedures of Plan D satisfy the applicable requirements of paragraphs (a), (c), and (d) of this section.

Example 5. (i) Facts. Same facts as Example 4 of this paragraph (f), except that, pursuant to Plan D's system for processing such transactions, a participant who so requests is transferred to a customer service representative whose conversation with the participant is recorded. The customer service representative provides the section 411(a)(11) notice from a prepared text and processes the participant's distribution in accordance with the predetermined instructions from the plan administrator.

(ii) Conclusion. As in Example 4 of this paragraph (f), because Plan D has relatively few and simple distribution options, the provision of the section 411(a)(11) notice through the automated telephone system is no less understandable to the participant than a written paper notice for purposes of paragraph (a)(4) of this section. Further, in this Example 5, the customer service telephone procedures of Plan D satisfy the requirements of paragraphs (a), (c), and (d) of this section.

Example 6. (i) Facts. Plan E, a qualified plan, permits participants to request distributions by e-mail on the employer's e-mail system. Under this system, a participant must enter his or her account number, personal identification number (PIN), and e-mail address. This information must match that in Plan E's records in order for the transaction to proceed. If a participant requests a distribution by e-mail, the plan administrator provides the participant with a section 411(a)(11) notice by e-mail. The plan administrator also advises the participant by e-mail that he or she may request the section 411(a)(11) notice on a written paper document and that, if the participant requests the notice on a written paper document, it will be provided at no charge. Participant Q requests a distribution and receives the section 411(a)(11) notice from the plan administrator by reply e-mail. However, before Participant Q elects a distribution, Q terminates employment. Following termination of employment, Participant Q no longer has access to the employer's e-mail system.

(ii) Conclusion. In this Example 6, Plan E does not satisfy the participant election requirements under paragraph (d) of this section because Participant Q is not effectively able to access the electronic medium used to make the participant election. Plan E must provide Participant Q with the opportunity to make the participant election through a written paper document or another system that Participant Q is effectively able to access, such as the automated telephone systems described in Example 4 and Example 5 of this paragraph (f).

(g) Effective date. The rules provided in this section apply to applicable notices provided, and to participant elections made, on or after January 1, 2007. However, a retirement plan, an employee benefit arrangement, or an individual retirement plan that provides an applicable notice or makes a participant election that complies with the requirements set forth in these regulations on or after October 1, 2000, and before January 1, 2007, will not be treated as failing to provide an applicable notice or to make a participant election merely because the notice or election was not in writing or written form.

Par. 5. Section 1.401(k)-3 is amended by adding a sentence to the end of the text of paragraph (d)(1) to read as follows:

§1.401(k)-3 Safe harbor requirements.

* * * * *

(d) * * *

(1) * * * See §1.401(a)-21 of this chapter for rules permitting the use of electronic media to provide applicable notices to recipients with respect to retirement plans.

* * * * *

Par. 6. Section 1.402(f)-1 is amended by:

(1) Revising A-5.

(2) Removing Q&A-6.

The revision reads as follows:

§1.402(f)-1 Required explanation of eligible rollover distributions; questions and answers.

* * * * *

A-5. Yes. See §1.401(a)-21 of this chapter for rules permitting the use of electronic media to provide applicable notices to recipients with respect to retirement plans.

Par. 7. Section 1.411(a)-11 is amended by:

(1) Revising the text of paragraphs (f)(1) and (2).

(2) Removing paragraph (g).

The revisions read as follows.

§1.411(a)-11 Restriction and valuation of distributions.

* * * * *

(f) * * *

(1) * * * The notice of a participant's rights described in paragraph (c)(2) of this section or the summary of that notice described in paragraph (c)(2)(iii)(B)(2) of this section must be provided on a written paper document. However, see §1.401(a)-21 of this chapter for rules permitting the use of electronic media to provide applicable notices to recipients with respect to retirement plans.

(2) * * * The consent described in paragraphs (c)(2) and (3) of this section must be given on a written paper document. However, see §1.401(a)-21 of this chapter for rules permitting the use of electronic media to make participant elections with respect to retirement plans.

Par. 8. Section 1.417(a)(3)-1 is amended by adding a sentence to the end of the text of paragraph (a)(3) to read as follows:

§1.417(a)(3)-1 Required explanation of qualified joint and survivor annuity and qualified preretirement survivor annuity.

(a) * * *

(3) * * * But see §1.401(a)-21 of this chapter for rules permitting the use of electronic media to provide applicable notices to recipients with respect to retirement plans.

* * * * *

Par. 9. Section 1.7476-2 is amended by revising paragraph (c)(2) to read as follows:

§1.7476-2 Notice to interested parties.

* * * * *

(c) * * *

(2) If the notice to interested parties is delivered using an electronic medium under an electronic system that satisfies the applicable notice requirements of §1.401(a)-21 of this chapter, the notice is deemed to be provided in a manner that satisfies the requirements of paragraph (c)(1) of this section.

* * * * *

PART 35--EMPLOYMENT TAX AND COLLECTION OF INCOME TAX AT SOURCE REGULATIONS UNDER THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982

Par. 10. The authority citation for part 35 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 11. Section 35.3405-1 is amended by:

- (1) Revising d-35, A.
- (2) Removing d-36, Q&A.

The revision reads as follows:

§35.3405-1 Questions and answers relating to withholding on pensions, annuities, and certain other deferred income.

* * * * *

d-35. * * *

A. A payor may provide the notice required under section 3405 (including the abbreviated notice described in d-27 of §35.3405-1T and the annual notice described in d-31 of §35.3405-1T) to a payee on a written paper document. However, see §1.401(a)-21 of this chapter for rules permitting the use of

electronic media to provide applicable notices to recipients with respect to retirement plans and individual retirement plans.

PART 54--PENSION EXCISE TAXES

Par. 12. The authority citation for part 54 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 13. Section 54.4980F-1, Q&A-13, is amended as follows:

- (1) Revising paragraph A-13 (c)(1)(ii) and (iii).
- (2) Revising the introductory text to paragraph A-13 (c)(2).
- (3) Removing paragraph A-13 (c)(3).

The revisions read as follows:

§54.4980F-1 Notice requirements for certain pension plan amendments significantly reducing the rate of future benefit accrual.

* * * * *

A-13. * * *

(c) * * *

(1) * * *

(ii) The section 204(h) notice is delivered using an electronic medium (other than an oral communication or a recording of an oral communication) under an electronic system that satisfies the applicable notice requirements of §1.401(a)-21.

(iii) Special effective date. For plan years beginning prior to January 1,

2007, Q&A-13 of this section, as it appeared in the April 1, 2006 edition of 26 CFR part 1, applies.

(2) * * * The following examples illustrate the requirement in paragraph (c)(1)(i) of this Q&A-13. In these examples, it is assumed that the notice satisfies

the requirements in paragraphs (c)(1)(ii) of this section. The examples are as follows:

* * * * *

Mark E. Matthews

Deputy Commissioner for Services and Enforcement.

Approved: October 10, 2006

Eric Solomon

Acting Deputy Assistant Secretary of the Treasury (Tax Policy).