

Pension ANALYST

Important Information

Plan Administration and Operation

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IRS Issues Final Electronic Media Rules

WHO'S AFFECTED This guidance applies to qualified defined benefit and defined contribution plans, including multiemployer plans and 403(b) arrangements, and governmental section 457(b) plans. It does not apply to nonqualified deferred compensation arrangements.

BACKGROUND AND SUMMARY In 2000, the IRS issued final rules regarding the use of electronic media for providing certain participant notices and obtaining consent to certain distributions. In 2002, the IRS published final rules allowing plan sponsors to provide electronic notice to interested parties regarding determination letter applications. These rules were discussed in the September 2002, *Pension Analyst* titled "[DOL and IRS Issue Rules for the Use of Electronic Media.](#)"

On October 20, 2006, the IRS issued additional final rules regarding the use of electronic media, such as email, Websites, automated telephone systems, and CD-ROMs, to provide certain notices, to make participant elections or to provide consent under employee benefit arrangements.

These final rules, which reflect the provisions of E-SIGN (the Electronic Signatures in Global and National Commerce Act), provide the sole standard for using electronic media to provide any notice or election that is required to be in writing, such as the section 402(f) rollover distribution notice. These rules also provide a safe harbor for any notice or election that is not required to be in writing. In addition, these rules make it possible to obtain electronic spousal consents and notarizations.

This issue of Prudential Retirement's *Pension Analyst* will address the final rules issued by the IRS in October.

ACTION AND NEXT STEPS Plan sponsors that are interested in using electronic methods for delivering required participant notices and obtaining participant elections and consents should review these rules.

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- [Comparison of IRS and DOL Electronic Media Rules](#)

Applicability

The final rules *apply* to any notice, election, or similar communication provided to or made by a participant, beneficiary, or alternate payee in a qualified plan, 403(b) arrangement, simplified employee pension plan (SEP), SIMPLE, or governmental section 457(b) plan, which is required to be written or in writing. This includes:

- Section 402(f) rollover distribution notices;
- ERISA section 204(h) notices;
- Qualified Joint and Survivor Annuity (QJSA) notices, elections and consents;
- Qualified Preretirement Survivor Annuity (QPSA) notices, elections and consents;
- ADP/ACP Safe Harbor Plan notices;
- Annual pension withholding notices;
- Loan notes;
- Notices of available distribution options; and
- Notices to interested parties.

In addition, the Department of Labor (DOL) recently issued Field Assistance Bulletin 2006-03 which provides interim guidance on the use of electronic media to provide individual benefit statements to participants and beneficiaries. This guidance provides that until further guidance is issued, plan sponsors may provide benefit statements electronically by following either the [DOL's electronic media rules](#) or the IRS rules discussed in this publication, or by providing continuous access to benefit statement information through one or more secure websites, provided certain requirements are met. Please see our January 2007, *Pension Analyst* titled, "[DOL Provides Interim Guidance Regarding Pension Protection Act's Periodic Benefit Statement Requirement](#)" for more information regarding this guidance.

Generally, these rules *do not apply* to any notice, election, consent, or disclosure required under ERISA Title I or IV, or to any Internal Revenue Code provision where the DOL or Pension Benefit Guaranty Corporation (PBGC) has similar interpretative authority, or to tax reporting and tax records. As a result, these rules do not apply to:

- Summary Plan Descriptions (SPDs);
- Summaries of Material Modifications (SMMs);
- Summary Annual Reports (SARs);
- ERISA section 404(c) information;
- Suspension of benefit notices; and
- Qualified Domestic Relations order (QDRO) notices.

General Requirements for Using Electronic Media

In order to use electronic media, the following requirements must be met:

- The timing and content rules that otherwise apply to the notice, election, or consent must be met.
- The electronic system must be designed to provide the information in a manner that is no less understandable than if provided on a written paper document. *For example, delivering a lengthy rollover distribution notice through an automated phone system would not be an acceptable delivery method. However, a plan with only a few distribution options may provide the notice of available distribution options and the right to defer distributions through an automated phone system.*
- The electronic system must be designed to alert the participant, at the time the notice is provided, to the significance of the information and provide any instructions needed to access the notice.
- The electronic record of an applicable notice or participant election must be maintained in a form that is capable of being retained and accurately reproduced for later reference.

Using Electronic Media to Provide Notices

A retirement plan may use either one of the following two methods to provide applicable notices to participants.

The Consumer Consent Method. Under the consumer consent method, the participant must consent to receive the notice electronically before the plan provides the notice. The consent must either:

- Be made in a manner that demonstrates the participant can access the notice in the electronic form that will be used to provide the notice; or
- Be made using a written paper document, but only if the participant confirms the consent electronically in a manner that reasonably demonstrates that the participant can access the notice in the electronic form to be provided.

Before a participant may consent to electronic delivery, the plan must provide him with a disclosure statement that describes:

- The scope of the consent;
- The participant's right to withdraw his or her consent to receive the notice electronically;
- The participant's right to receive the notice using paper, along with any fees imposed for receiving paper;
- The hardware and software requirements for accessing the notice; and
- Procedures for updating information to contact the participant electronically.

Under the consumer consent method, the consent may not be provided verbally.

For example, the ABC Plan, a qualified plan, permits participants to request benefit distributions from the plan's Internet website. When Paul, a participant in the ABC Plan, requests a plan distribution from the website, a disclosure appears on the computer screen that explains that Paul can consent to receive the rollover distribution notice electronically. The disclosure meets the content requirements described in the consumer consent requirements. After reviewing the disclosure, Paul consents to receive the rollover distribution 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 Paul's e-mail address in order to demonstrate that he can access the spreadsheet. In the e-mail, Paul is prompted to answer a question from the spreadsheet program, which is in an attachment to the e-mail. Once Paul correctly answers the question, the rollover distribution notice is e-mailed to him.

The Alternative Method. Under the alternative method, no affirmative consent is required from the participant provided that the participant is "effectively able" to access the electronic medium used to provide the notice. In addition, the plan must advise the participant that he may request and receive the applicable notice in writing on paper at no charge.

For example, XYZ Plan, a qualified plan, permits participants to request distributions from the plan on the plan's Internet website. After Betty, a single employee, requests a distribution from the plan, the plan administrator provides Betty with the notice of available distribution options and the right to defer distributions in an attachment to an e-mail. The plan sends the e-mail with a request for a computer generated notification that the message was received and opened. The e-mail instructs Betty to read the attachment for important information regarding the request for a distribution. The e-mail also states that Betty may ask to receive the notice on a written paper document at no charge. The plan receives an electronic notice that Betty received and opened the e-mail.

Using Electronic Media for Participant Elections

In order to use electronic media for consent or elections made by participants, the following requirements must be met:

- The participant must be effectively able to access the electronic medium in order to make the participant election;
- The electronic system must be reasonably designed to preclude any person other than the appropriate individual from making a participant election;
- The electronic system must provide the participant making the election with a reasonable opportunity to review, confirm, or rescind the terms of the election before it becomes effective; and
- The participant making the election must receive, within a reasonable time period, a confirmation of the election through either the [consumer consent method](#), or the [alternative method](#) of the notice requirements.

If a participant is unable to effectively access the electronic medium to make an election, the plan must offer the participant the right to make the election in another medium that is accessible to the participant (such as a paper election).

Using Electronic Media for QJSA Notices and Elections

In the case of a participant election that must be witnessed by a plan representative or a notary public (such as a spousal consent), electronic notarization acknowledging a signature is permitted if the signature of the individual making the election is witnessed in the physical presence of a plan representative or notary public. Any electronic notarization must also comply with state law requirements applicable to notary publics.

For example, the KLM Plan, a qualified money purchase pension plan, permits Lucy, a married participant, to request a plan loan through the plan's Internet website with the notarized consent of her spouse. After Lucy completes the loan application on the plan website, Lucy is instructed to submit a notarized spousal consent form. Lucy and her spouse go to a notary public and the notary witnesses the spouse signing the spousal consent for the loan agreement on an electronic signature capture pad with adequate security. Lucy lives in a state that permits electronic notarizations. After witnessing the spousal consent, the notary public sends an e-mail that is attached to or logically associated with the signature of Lucy's spouse to the plan administrator.

Effective Date and Next Steps

These rules apply to notices provided, and participant elections made, on or after January 1, 2007. However, a plan sponsor may comply with these rules for notices provided, and participant elections made on or after October 1, 2000, and before January 1, 2007.

Plan sponsors may want to review their current practices and determine if it would be beneficial to implement the use of electronic media for providing plan notices and obtaining participant and spousal consents. If you have questions regarding these rules, please contact your Prudential Retirement representative.

Pension Analyst by Prudential Retirement

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