
IRS and Labor Department Positions on Use of Electronic Communications in Employee Benefit Plan Administration

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The Internal Revenue Service (the "IRS") and the Department of Labor (the "DOL") have provided guidance concerning the use of electronic communications in administering employee benefit plans. Electronic communications can significantly reduce costs of administering benefit programs. Most recently, the IRS issued final regulations concerning uses of electronic media (such as automated phone systems, email and web sites) for communication with participants in Section 401(k) and other retirement plans ("Qualified Plans"). Similarly, the DOL issued proposed rules in 1999 addressing electronic communications used to satisfy reporting and disclosure obligations for all employee benefit plans subject to the Employee Retirement Security Act of 1974 ("ERISA"). These regulations have not yet been finalized but can be relied on by plan administrators.

This alert summarizes the manner in which plan administrators may use electronic media for Qualified Plan administration and to comply with certain reporting and disclosure requirements under ERISA.

Previous IRS Action

In 1999, the IRS first addressed the use of electronic media in connection

with administering Qualified Plans. [IRS Notice 99-1](#) approved certain "paperless" administrative practices, which had already been adopted by many Qualified Plan administrators. The IRS approved the use of electronic means for enrolling participants in a Qualified Plan, allowing contribution elections, making and changing investment elections, and designating beneficiaries when spousal consent is not required. The Internal Revenue Code (the "Code") did not explicitly require use of "written paper documents" for these notices and did not prohibit the use of electronic media. At the same time, the IRS issued proposed regulations concerning other notices and consents required in connection with Qualified Plans for which the Code did require "written communication." These regulations have now been finalized.

Final IRS Regulations

The [final IRS regulations](#), effective for plan years beginning after January 1, 2001, address notices required as part of the distribution of Qualified Plan benefits. The regulations permit the electronic delivery of three types of notices:

- notices of distribution choices available to a participant under a Qualified Plan and the participant's right to defer distributions prior to normal retirement age of an accrued vested benefit valued at more than \$5,000 [Code Section 411(a)(11)];
- notices explaining a participant's right to elect a direct rollover to another retirement plan or an IRA and the tax effects of that form of distribution, as well as other tax rules applicable to available distribution forms [Code Section 402(f)]; and
- notices of a participant's right to waive income tax withholding on certain Qualified Plan distributions [Code Section 3405(e)(10)(B)].

While the regulations normally require that the first two notices be delivered within 30 to 90 days prior to the benefit distribution, the final regulations permit a Qualified Plan to provide these notices more than 90 days before a distribution of the benefit (or the annuity starting date), such

as in the summary plan description. However, in order for a plan to take advantage of this flexibility, it must also provide a summary of the notices within the 30 to 90 day period prior to the date of distribution (or the annuity starting date), and that summary must include: (1) the principal provisions of the full notice; and (2) a reference to the most recent version of the full notice available to the participant (and if other information was included in a document that contained the full notice, the participant must be told how to locate the notice in that document).

If delivered electronically, all three forms of notice must meet the following general standards:

- the notice must be "reasonably accessible" to the participant;
- the electronic system must be reasonably designed to provide the notice in a manner that it is "no less understandable" to the recipient than a paper copy; and
- at the time the notice is provided electronically the distributee must be advised that a full copy of the notice, in a written document, is available without charge, even if there is an online capacity to print a copy of the notice.

A participant's consent to distribution under Code Section 411(a)(11), in response to a written or electronic notice, may also be conveyed in writing or electronically. If consent is provided electronically, the system must:

- be reasonably designed to preclude any individual other than the participant from giving consent (such as through use of personal identification numbers);
- provide the participant a reasonable opportunity to review and confirm, modify or rescind the terms of the distribution before the consent becomes effective; and
- provide a confirmation of the terms (including the form) of the distribution either in writing or in an electronic notice which meets the general standards applicable to electronic notices.

Spousal consents under Sections 401(a)(11) and 417 of the Code and notices of reduction of future accruals under Section 204(h) of ERISA can not yet be communicated electronically. However, notices in connection with "safe harbor" 401(k) plans can be conveyed electronically. [IRS Notice 2000-3](#) sets forth the standards for such notices, which are comparable to those required of the three notices described above.

In 2000, the IRS also finalized [additional loan regulations](#) under Section 72(p) of the Code, including provisions for electronic administration of plan

loans. These regulations are generally applicable to loans made after January 1, 2002. They provide that communications concerning the loan may be made through electronic media consistent with the requirements of the regulations governing notices and consents. The loan agreement, which must be legally enforceable under applicable law, need not be signed if that does not impair its enforceability. The regulations note the passage of the federal electronic signature law last year, discussed in our [June 28, 2000 Internet Alert](#), and requests comment on the impact of that law on these regulations or any other regulations involving loan requirements.

Previous DOL Action

Under Title I of ERISA, the DOL has responsibility for enforcing the general requirements concerning reporting and disclosure obligations with respect to all employee benefit plans subject to ERISA. In 1997, [the DOL issued regulations](#), governing the electronic delivery of certain ERISA-required communications for administration of group health plans. These regulations were intended to create an interim "safe harbor," and were not intended to indicate that other uses of electronic media were impermissible. The DOL noted that the statute does not require a particular form of delivery when other methods are reasonably calculated to ensure actual receipt and full distribution of the information.

Proposed Regulations Extend Use of Electronics

Good faith compliance with the [proposed regulations](#) issued by the DOL allow plan administrators to immediately use electronic forms of communication in meeting the reporting and disclosure requirements of Title I of ERISA addressed in the proposals. These regulations are based largely on the interim rules.

The proposed regulations govern distribution of a summary plan description, a summary of material modifications and a summary annual report. The interim rules for health plans addressed only the first two employee communications. Otherwise, the proposal's content mirrors that of the interim rule, requiring that:

- the administrator take steps to ensure delivery results in actual receipt of the transmitted information through use of a return-receipt feature or periodic reviews and surveys to confirm receipt;
- the electronically delivered documents meet the style, format and content requirements of the paper documents; and
- each participant is notified of the document being furnished, its significance, and the participant's right to request, free of charge, a paper copy of the document which is then delivered.

The DOL rules apply only to communications with participating employees who are expected to access the employer's electronic information system as an integral part of his or her duties at the worksite, and who have access to a printer at the worksite.

Despite expectations last year that the DOL would finalize these regulations, they are still in proposed form. Final rules are expected to be issued later this year.

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