

# Proposed Rules

Federal Register

Vol. 70, No. 134

Thursday, July 14, 2005

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Parts 1 and 301

[REG-125443-01]

RIN 1545-AY92

#### Revisions to Regulations Relating to Withholding of Tax on Certain U.S. Source Income Paid to Foreign Persons and Revisions of Information Reporting Regulations; Hearing Cancellation

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Cancellation of notice of public hearing on proposed rulemaking.

**SUMMARY:** This document cancels a public hearing on proposed regulations that relates to the withholding of income tax under sections 1441 and 1442 on certain U.S. source income paid to foreign persons and related requirements governing collection, deposit, refunds, and credits of withheld amounts under sections 1461 through 1463.

**DATES:** The public hearing originally scheduled for July 20, 2005, at 10 a.m., is cancelled.

**FOR FURTHER INFORMATION CONTACT:** Robin R. Jones of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration) at (202) 622-7180 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:** A notice of proposed rulemaking and notice of public hearing that appeared in the **Federal Register** on Monday, April 18, 2005 (70 FR 20099) announced that a public hearing was scheduled for July 20, 2005, at 10 a.m., in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is under sections 1441 and 1442 of the Internal Revenue Code. The public comment period for these regulations expired on June 29, 2005.

The notice of proposed rulemaking and notice of public hearing, instructed those interested in testifying at the public hearing to submit a request to speak and an outline of the topics to be addressed. As of Thursday, July 07, 2005, no one has requested to speak. Therefore, the public hearing scheduled for July 20, 2005, is cancelled.

**Cynthia E. Grigsby,**

*Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).*

[FR Doc. 05-13798 Filed 7-13-05; 8:45 am]

BILLING CODE 4830-01-P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Parts 1, 35, and 54

[REG-138362-04]

RIN 1545-BD68

#### Use of Electronic Technologies for Providing Employee Benefit Notices and Transmitting Employee Benefit Elections and Consents

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed regulations that would provide guidance on the use of electronic media to provide certain notices to recipients or to transmit participant and beneficiary elections or consents with respect to employee benefit arrangements. In general, these proposed regulations would affect sponsors of, and participants and beneficiaries in, certain employee benefit arrangements. This document also provides a notice of public hearing on these proposed regulations.

**DATES:** Written or electronic comments must be received by October 12, 2005. Requests to speak (with outlines of oral comments to be discussed) at the public hearing scheduled for November 2, 2005, must be received by October 12, 2005.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-138362-04), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington

DC 20044. Submissions may be hand delivered Monday through Friday, between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-138362-04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the IRS Internet site at <http://www.irs.gov/regs> or via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS-REG-138362-04). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

#### FOR FURTHER INFORMATION CONTACT:

Concerning the proposed regulations, Pamela R. Kinard at (202) 622-6060; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard Hurst, (202) 622-7180 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Paperwork Reduction Act

The collections of information referenced in this notice of proposed rulemaking 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). No substantive changes to these collections of information are being proposed.

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 a collection 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 proposed amendments to the regulations under section 401 of the Internal Revenue Code (Code) and to other sections of the Code relating to employee benefit arrangements. These proposed amendments, when finalized, will set forth rules regarding the use of electronic media to provide notices to plan participants and beneficiaries or to transmit elections or consents relating to employee benefit arrangements. These regulations also reflect the provisions of the Electronic Signatures in Global and National Commerce Act, Public Law 106-229 (114 Stat. 464 (2000)) (E-SIGN).

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 retirement plan notices, elections, or consents to be written or in writing.<sup>1</sup> Examples of these rules include the following:

- Under sections 401(k)(12)(D) and 401(m)(11), a written notice is required to be given to each employee eligible to participate in a cash or deferred arrangement under section 401(k) in order for the plan to be permitted to use a safe harbor in lieu of the actual deferral percentage test or actual contribution percentage test to ensure that the plan satisfies certain nondiscrimination requirements.

- Under section 402(f), a plan is required to provide a distributee, within a reasonable period of time before an eligible rollover distribution is made, a written explanation of the distributee's rollover rights and the tax and other potential consequences of the distribution or rollover.

- Under section 411(a)(11) (and the parallel provision in section 203(e) of ERISA) and § 1.411(a)-11(f)(2), a participant cannot be cashed out of a plan before the later of normal retirement age or age 62 without the participant's written consent if the value of the participant's nonforfeitable accrued benefit exceeds \$5,000.

- Under section 417 (and the parallel provision in section 205 of ERISA) and the regulations thereunder, a plan must provide to each participant a written explanation of the terms and conditions

of a qualified joint and survivor annuity, the participant's right to make an election to waive the qualified joint and survivor annuity, the right to revoke such an election, and the rights of the participant's spouse. Under section 417(a)(2), an election to waive a qualified joint and survivor annuity can generally go into effect only if the participant's spouse consents to the election in writing and that consent is witnessed by either a plan representative or a notary public.

- Under section 3405(e)(10)(B) and § 34.3405-1, A-d-35, a payor is required to provide written notice to a payee regarding the payee's right to elect not to have Federal income tax withheld from a periodic payment (as defined in section 3405(e)(2)).

- Under section 4980F (and the parallel provision in section 204(h) of ERISA) and § 54.4980F-1, A-13, a plan must provide written notice (section 204(h) notice) of an amendment to an applicable pension plan that either provides for a significant reduction in the rate of future benefit accrual or that eliminates or significantly reduces an early retirement benefit or retirement-type subsidy.

Section 1510 of the Taxpayer Relief Act of 1997, Public Law 105-34 (111 Stat. 788, 1068) (TRA '97), provides for the Secretary of the 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. Pursuant to the mandate of section 1510 of TRA '97, final regulations (TD 8873) relating to the use of electronic media for transmissions of notices and consents under sections 402(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). These regulations are discussed in this preamble under the heading *Prior Guidance Related to New Technologies*.

E-SIGN, signed into law on June 30, 2000, generally provides that electronic documents and signatures are given the same legal effect as their paper counterparts. Section 101(a) of E-SIGN provides that, notwithstanding any statute, regulation, or rule of law relating to a transaction in or affecting interstate or foreign commerce, a signature, contract, or other record may not be denied legal effect, validity, or

enforceability solely because it is in electronic form.

Section 101(b)(1) 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 be written, signed, or in non-electronic form. Section 101(b)(2) provides that E-SIGN does not require any person to agree to use or accept electronic signatures or records, other than a governmental agency with respect to a record other than a contract to which it is a party.

Section 101(c) of E-SIGN sets forth special protections for consumers that apply when a statute, regulation, or other rule of law requires that consumer information relating to a transaction be provided or made available in writing.<sup>2</sup> Under those protections, before information can be transmitted electronically, a consumer must first affirmatively consent to receiving 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, that confirmation of the consent 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 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.

Section 104(b)(1) of E-SIGN generally provides that a Federal or state agency that is responsible for rulemaking under a statute has interpretative authority to issue guidance interpreting section 101

<sup>1</sup> 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 I of ERISA, but, in exercising that authority, is bound by the regulations issued by the Secretary of Treasury.

<sup>2</sup> 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.

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 regulation 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 the regulations find that the rules selected to carry out the purpose of the relevant statute are substantially equivalent to the requirements imposed on records that are not electronic, do not impose unreasonable cost on the acceptance and use of electronic records, and do not require or give 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 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.

Subsequent to the enactment of E-SIGN, Congress amended section 204(h) of ERISA and enacted a corresponding provision in section 4980F of the Code. Under ERISA section 204(h)(7) and Code section 4980F(g), the Secretary of the Treasury may, by regulations, allow any section 204(h) notice to be provided by using new technologies.

#### *Prior Guidance Relating to New Technologies*

Following the enactment of section 1510 of TRA '97, the Treasury Department and IRS issued several items of guidance relating to the use of electronic media with respect to employee benefit arrangements. 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 certain 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.<sup>3</sup>

<sup>3</sup> The 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,

The 2000 regulations relating to the use of electronic media for transmissions of notices and consents required to be in writing under sections 402(f), 411(a)(11), and 3405(e)(10)(B) set forth standards for the electronic transmission of certain notices and consents required in connection with distributions from retirement plans. These 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. The system must be reasonably designed to provide the notice in a manner no less understandable to the participant than a written paper document. In addition, 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 permit an electronic system to satisfy the requirement 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.

Subsequent to the issuance of the 2000 regulations, the Treasury Department and IRS have applied the standards set forth in those regulations in other situations. For example,

"Voluntary Withholding Request," if certain requirements, including signature and recordkeeping requirements, are satisfied. In addition, Notice 2004-10 (2004-6 I.R.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).

§ 1.7476-2(c)(2) provides that a notice to an interested party<sup>4</sup> 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) 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, regulations at § 1.72(p)-1, Q&A-3(b), require 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 2003, final regulations (TD 9052) under section 4980F were published in the **Federal Register** (68 FR 17277). Q&A-13 of § 54.4980F-1 provides the rules for the manner of delivering a section 204(h) notice. For a plan to deliver electronically a section 204(h) notice, the following requirements must be satisfied. First, 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. Second, 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.

In addition, the regulations under section 4980F provide a safe harbor method for delivering a section 204(h) notice electronically. Under the safe harbor, which is substantially the same as the consumer consent rules of E-SIGN, consent must be made

<sup>4</sup> Under section 7476, in order to receive a determination letter on the qualified status of a retirement plan, the applicant must provide evidence that individuals who qualify as interested parties received notification of the determination letter application.

electronically in a manner that reasonably demonstrates the individual's ability to access the information in electronic form. The applicable individual must also provide an address for the delivery of the electronic section 204(h) notice and the plan administrator must provide the applicable individual with certain disclosures regarding the section 204(h) notice, including the right to withdraw consent.

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.

### Explanation of Provisions

#### Overview

The proposed regulations would coordinate the existing notice and election rules under the Code and regulations relating to certain employee benefit arrangements with the requirements of E-SIGN and set forth the exclusive rules relating to the use of electronic media to satisfy any requirement under the Code that a communication to or from a participant, with respect to the participant's rights under the employee benefit arrangement be in writing or in written form. The standards set forth in the proposed regulations would also function as a safe harbor when an electronic medium is used for any communication that is not required to be in writing or in written form.

The proposed regulations would apply to any notice, election, or similar communication provided to or made by a participant or beneficiary under a qualified plan, an annuity contract described in section 403(a) or 403(b), 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). Thus, for example, the proposed regulations would apply to a section 402(f) notice, a section 411(a)(11) notice, and a section 204(h) notice.

In addition, the proposed regulations would apply to any notice, election, or similar communication provided to or made by a participant or beneficiary under an accident and health plan or an arrangement under section 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 Medical Savings Account under section 220, or a health savings account under section 223.

However, the proposed regulations would not apply to any notice, election, consent, or disclosure required under the provisions of title I or IV of ERISA over which the DOL or the PBGC has interpretative and regulatory authority. For example, the rules in § 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. The proposed regulations would also 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 DOL and the PBGC have similar interpretative authority. In addition, the rules in these proposed regulations apply only with respect to notices and elections relating to a participant's rights under an employee benefit arrangement; thus they do not apply with respect to other requirements under the Code, such as requirements relating to tax reporting, tax records,<sup>5</sup> or substantiation of expenses.

#### Requirements for the Use of Electronic Media

These proposed regulations would require 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. In addition, these regulations would require that the content of the notice and the medium through which it is delivered be reasonably designed to provide the information to a recipient in a manner no less 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.<sup>6</sup> The regulations would also require that, at the time the applicable notice is provided, the electronic

<sup>5</sup> See section 6001 of the Code and the regulations thereunder, and Rev. Proc. 98-25 (1998-1 C.B. 689) (setting forth the basic requirements that the IRS treats as essential for satisfying the recordkeeping requirements of section 6001 in cases where a taxpayer's records are maintained in electronic form).

<sup>6</sup> 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).

transmission alert the recipient to the significance of the transmittal (including the identification of the subject matter of the notice), and provide any instructions needed to access the notice, in a manner that is readily understandable and accessible.

The view of the Treasury Department and IRS is that a participant under an employee benefit arrangement is generally a consumer within the meaning of section 106(1) of E-SIGN when receiving a notice in order to make a decision about the participant's benefits or other rights under an employee benefit arrangement.<sup>7</sup> Accordingly, § 1.401(a)-21(b) of these proposed regulations would provide rules, reflecting the consumer consent requirements of section 101(c) of E-SIGN, under which an employee benefit arrangement may provide an applicable notice through an electronic medium. However, the Treasury Department and IRS also believe that, if an employee benefit arrangement could provide these notices only by complying with the rules in § 1.401(a)-21(b) of these proposed regulations, it would impose a substantial burden on electronic commerce. Furthermore, there is an alternative that is less burdensome and that would not increase the material risk of harm to plan participants. Accordingly, § 1.401(a)-21(c) of these proposed regulations provides an alternative means of providing notices electronically.

Section 1.401(a)-21(b) of these proposed regulations would generally require that before a plan may provide an applicable notice using an electronic medium, the participant must consent to receive the communication electronically. The consent generally must be 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 or through some other nonelectronic means, 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,

<sup>7</sup> 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.

consequences, or fees in the event of the withdrawal), and the right to receive the communication using 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.

Section 1.401(a)-21(c) of these proposed regulations provides alternate conditions for providing notices electronically. The proposed regulations would exempt applicable notices from the consumer consent requirements of E-SIGN and would provide an alternative method of complying with the requirement that a participant notice be in writing or in written form if the plan complies with those conditions. This alternative method of compliance is based on the 2000 regulations previously issued under section 1510 of TRA '97 (which provides that any guidance issued should maintain *the protection of the rights of participants and beneficiaries*). This alternative method of compliance 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*.

The alternative method of compliance 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 the rules in those 2000 regulations. As under the 2000 regulations, the proposed regulations would retain the requirement that, at the time the applicable notice is provided, the participant must be advised that he or she may request and must receive the applicable notice in writing on paper at no charge. However, the requirement that the electronic medium be reasonably accessible under the 2000 regulations would be changed to require that the recipient of the notice be effectively able to access the electronic medium. This is not intended to reflect a substantive change in the rules, but rather to avoid confusion with 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).<sup>8</sup>

Proposed § 1.401(a)-21(d) would set forth the requirements that apply if a consent, election, request, agreement, or similar communication is made by or from a participant, beneficiary, or alternate payee using an electronic medium. (For simplicity, the proposed regulations refer to all of these types of actions as *participant elections*.) The rules in proposed § 1.401(a)-21(d), which are also based on the standards in the 2000 regulations, would require that (1) the participant be effectively able to access the electronic system in order to transmit the participant election, (2) the electronic system be reasonably designed to preclude any person other than the participant from making the participant election (for example, through the use of a personal identification number (PIN)), (3) the electronic system provide the participant making the participant election with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election before it becomes effective, and (4) the participant making the 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 proposed § 1.401(a)-21(b) or (c).

These regulations require that a participant be effectively able to access the electronic system that the plan provides for participant elections, but, like the 2000 regulations, do not require that a plan also permit the election to be transmitted by paper as an alternative to using the electronic system available to the participant. If a plan were to require participant elections to be provided electronically, such as requiring that any consent to a distribution under section 411(a)(11) be transmitted electronically through a particular medium (without an option to make the

election on paper), then these regulations would not apply with respect to a participant who is not effectively able to access to the electronic medium. In addition, such a participant would be effectively unable to provide consent and would generally not be paid until the later of age 62 or normal retirement age. Moreover, no form of distribution would be available to the former employee and such a plan may have difficulties demonstrating compliance with the qualification requirements. For example, the plan may not be able to demonstrate that it satisfies the requirements of § 1.401(a)(4)-4 under which benefits, rights, and features, such as a right to early distribution, must be made available in a nondiscriminatory manner.<sup>9</sup>

Unlike the 2000 regulations, the rules in these proposed regulations would extend the use of electronic media to the notice and election rules applicable to plans subject to the QJSA requirements of section 417. Section 417 requires the consent of a spouse to be witnessed by a plan representative or a notary public. In accordance with section 101(g) of E-SIGN, the proposed regulations would permit the use of an electronic acknowledgment or notarization of a signature (if the standards of section 101(g) of E-SIGN and State law applicable to notary publics are satisfied). However, the proposed regulations would require that the signature of the individual be witnessed in the physical presence of the plan representative or notary public, regardless of whether the signature is provided on paper or through an electronic medium.

As discussed above, these proposed regulations, which are consistent with section 101 of E-SIGN and do not add to the requirements of that section, are issued to set forth rules that coordinate section 101 of E-SIGN with the sections of the Code relating to employee benefit arrangements. In accordance with section 104(b)(2)(C) of E-SIGN, the Treasury Department and IRS find that there is substantial justification for these proposed regulations, that 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

<sup>8</sup> 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 proposed regulations only provides rules for satisfying, through the use of electronic media, a requirement that a notice or election be in writing.

<sup>9</sup> Similar problems would arise under section 411(d)(6), assuming the plan previously permitted election of early distribution to be made on paper.

status or effect to) the use of any specific technology.

#### *Conforming Amendments to Other Rules in Law*

The proposed regulations would modify a number of existing regulations (including the 2000 regulations and the other regulations described above) that have previously provided rules relating to the use of new technology in providing applicable notices 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 adversely affect existing administrative practices of plan sponsors designed to comply with the 2000 regulations.

As noted above, these proposed regulations would apply to categories of applicable notices that were not previously addressed in the 2000 regulations and 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 § 1.401(a)-21 of this chapter are satisfied.

#### **Proposed Effective Date**

These regulations are proposed to apply prospectively. Thus, these rules will apply no earlier than the date of the publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. These regulations cannot be relied upon prior to their issuance as final regulations.

#### **Special Analyses**

It has been determined that this notice of proposed rulemaking 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 section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not propose any new collection of information, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. These regulations only provide guidance on how to satisfy existing collection of information requirements through the use of electronic media. Pursuant to section 7805(f) of the Code, these proposed regulations will be submitted

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

#### **Comments and Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and IRS specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

The proposed regulations have reserved the issue of whether there should be any exceptions to the rule generally requiring the physical presence of the spouse for a notarization of the spouse's consent. Comments are requested on whether the reservation should be: (i) Deleted in favor of a broad prohibition that has no exception; (ii) filled in based on a general standard under which electronic notarization of an electronic signature (without the spouse's presence) would be permitted if the technology provides the same protections and assurance as the requirement that a person's signature be executed in the presence of a notary (*e.g.*, that the spouse is actually the person signing); or (iii) filled in with a grant of discretion to the Commissioner to determine in the future, after advance notice and an opportunity for comment, that a particular form of electronic notarization of an electronic signature (without the spouse's presence) provides the same protections and assurance as the requirement that a person's signature be executed in the presence of a notary.

A public hearing has been scheduled for November 2, 2005, beginning at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the main entrance, located at 1111 Constitution Avenue, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** portion of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit

written or electronic comments and an outline of the topics to be discussed and time to be devoted to each topic (a signed original and eight (8) copies) by October 12, 2005. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving comments has passed. Copies of the agenda will be available free of charge at the hearing.

#### *Drafting Information*

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

#### **Proposed Amendments to the Regulations**

Accordingly, 26 CFR parts 1, 35, and 54 are proposed to be 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(b)(1) and (2) 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 an electronic medium under a system that satisfies the participant election requirements of § 1.401(a)–21(d) of this chapter.

\* \* \* \* \*

**Par. 3.** Section 1.401(a)–21 is added to read as follows:

**§ 1.401(a)–21 Rules relating to the use of electronic media to provide applicable notices and to transmit participant elections.**

(a) *Introduction*—(1) *In general*—(i) *Permission to use electronic media.* This section provides rules relating to the use of electronic media to provide applicable notices and to transmit participant elections as defined in paragraphs (e)(1) and (2) of this section with respect to certain employee benefit arrangements referenced in 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 electronic media to provide an applicable notice or to transmit a participant election if the notice or election is required under the Internal Revenue Code or Department of Treasury regulations to be in writing or in written form.

(B) *Rules relating to applicable notices.* An applicable notice that is provided using electronic media is treated as being provided in writing or in written form if and only if the consumer consent requirements of paragraph (b) of this section are satisfied 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 transmitted using electronic media is treated as being provided in writing or in written form if and only if the requirements of paragraph (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 electronic media to provide the applicable notice or to transmit 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 a qualified retirement plan under section 401(a) or 403(a). In addition, the rules of this section apply to any applicable notice and any participant election relating to an annuity contract under section 403(b), 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).

(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 accident and health plans or arrangements under sections 104(a)(3) and 105, cafeteria plans under section 125, qualified education assistance programs under section 127, qualified transportation fringe programs under section 132, Archer medical savings accounts under section 220, and health savings accounts under section 223.

(3) *Limitation on application of rules*—(i) *In general.* The rules of this section do not apply to any notice, election, consent, or disclosure 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 regulatory authority. For example, the rules in 29 CFR 2520.104b–1 of the 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) *Other requirements under the Internal Revenue Code.* Because the rules in this section only apply with respect to applicable notices and participant elections relating to a participant's rights under an employee benefit arrangement; thus they do not apply with respect to other requirements under the Internal Revenue Code, such as requirements relating to tax reporting, tax records, or substantiation of expenses.

(4) *Additional requirements related to applicable notices and participant elections.* The rules of this section supplement the general requirements related to each applicable notice and to each participant election. Thus, in addition to satisfying the rules for delivery under this section, the timing, content, and other general requirements (including recordkeeping requirements in guidance issued by the Commissioner under section 6001) relating to the applicable notice or participant election must be satisfied. With respect to the content of the notice, the system of delivery must be reasonably designed to provide the applicable notice to a recipient in a manner no less understandable to the recipient than a written paper document. In addition, at the time the applicable notice is provided, the electronic transmission must alert the recipient to the significance of the transmittal (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 and accessible.

(b) *Consumer consent requirements*—(1) *Requirements.* The consumer consent requirements of this paragraph (b) are satisfied if the requirements in paragraphs (b)(2) through (5) of this section are satisfied.

(2) *Consent*—(i) *In general.* The recipient must affirmatively consent to the delivery of the applicable notice using electronic media. 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 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 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.

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

(5) *Prohibition on oral communications.* For purposes of this paragraph (b), neither an oral communication nor a recording of an oral communication is an electronic record.

(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 paragraphs (d)(2) through (6) of this section are satisfied.

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

(3) *Authentication.* The electronic system used in delivering a participant election is reasonably designed to preclude any person other than the appropriate individual from making the election. For example, a system can require that an account number and a personal identification number (PIN) be entered into the system before a participant election can be transmitted.

(4) *Opportunity to review.* The electronic system provides the individual 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, within a reasonable time, receives a confirmation of the effect of the election under the terms of the plan 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) Except as provided in paragraph (d)(6)(ii) of this section, 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), 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 so long as the signature of the individual is witnessed in the physical presence of the plan representative or notary public.

(ii) [Reserved].

(e) *Definitions.* The following definitions apply to 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 an arrangement described in paragraph (a)(2) of this section.

(2) *Participant election.* The term *participant election* includes any consent, election, request, agreement, or similar communication made by or from a participant, beneficiary, or alternate payee to which this section applies under an arrangement described in paragraph (a)(2) of this section.

(3) *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.

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

(5) *Electronic media*. The term *electronic media* means an electronic method of communication (e.g., web sites, electronic mail, telephonic systems, magnetic disks, and CD-ROMs).

(6) *Electronic record*. The term *electronic record* means an applicable notice created, generated, sent, communicated, received, or stored by electronic means.

(f) *Examples*. The following examples illustrate the rules of this section. In all of these examples, with the exception of *Example 4* and *Example 5*, assume that the requirements of paragraph (a)(4) of this section are satisfied. The examples read as follows:

*Example 1. (i) Facts*. Plan A, a qualified plan, permits participants to request benefit distributions from the plan on Plan A's Intranet web site. Under Plan A's system for such transactions, a participant must enter his or her account number and personal identification number (PIN), and this information must match the information in Plan A's records in order for the transaction to proceed. If a participant requests a distribution from Plan A on Plan A's web site, then, at the time of the request for distribution, a disclosure statement appears on the computer screen that explains that the participant can consent to receive the section 402(f) notice electronically. In the disclosure statement, Plan A provides information relating to the consent, including how to receive a paper copy of the notice, how to withdraw the 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, the participant 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, the participant must demonstrate that the participant can access the spreadsheet program by answering a question from the spreadsheet program, which is in an attachment to an e-mail. Once the participant correctly answers the question, the section 402(f) notice is then delivered to the participant via e-mail.

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

*Example 2. (i) Facts*. Plan B, a qualified plan, permits participants to request benefit distributions from the plan by e-mail. Under

Plan B's system for such transactions, a participant must enter his or her account number and personal identification number (PIN) and this information must match the information in Plan B's records in order for the transaction to proceed. If a participant requests a distribution from Plan B by e-mail, the plan administrator provides the participant 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 the participant to read the attachment for important information regarding the request for a distribution. In addition, the e-mail also provides that the participant 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. Plan B receives notification indicating that the e-mail was received and opened by the participant. The participant is effectively able to access the e-mail system used to make a participant election and consents to the distribution by e-mail. Within a reasonable period of time after the participant's consent to the distribution by e-mail, the plan administrator, by e-mail, sends confirmation of the terms (including the form) of the distribution to the participant and advises the participant that the participant may request the confirmation on a written paper document that will be provided at no charge.

(ii) *Conclusion*. In this *Example 2*, Plan B's delivery of the section 411(a)(11) notice and the transmission of a participant's consent to a distribution satisfy the requirements of paragraphs (c) and (d) of this section.

*Example 3. (i) Facts*. Plan C, a qualified pension plan, permits participants to request plan loans through the Plan C's web site on the internet with the notarized consent of the spouse in accordance with applicable State law. Under Plan C'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. The information entered by the participant must match the information in Plan C's records in order for the transaction to proceed. A participant may request a loan from Plan C by following the applicable instructions on Plan C's web site. Participant M, a married participant, is effectively able to access the web site available to apply for a loan and completes the forms on the web site for obtaining the loan. The forms include attachments setting forth the terms of the loan agreement and all other required information. Participant M is then instructed to 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. 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 the participant, giving the participant a reasonable period to review and confirm the loan application or to determine whether the application should be modified or rescinded. In addition, the e-mail to the participant also provides that the participant may request the plan loan application on a written paper document and that, if the participant requests the written paper document, it will be provided at no charge.

(ii) *Conclusion*. In this *Example 3*, the transmissions of the loan agreement and the spousal consent satisfy the requirements of paragraph (d) of this section.

*Example 4. (i) Facts*. 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 that 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. A participant may request a distribution from Plan D by following the applicable instructions on the automated telephone system. After the participant has requested a distribution, the automated telephone system recites the section 411(a)(11) notice to the participant. The automated telephone system also advises the participant that he or she may request the 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. The participants are effectively able to access the automated telephone system used to make a participant election. The automated telephone system requires a participant to review and confirm the terms (including the form) of the distribution before the transaction is completed. After the participant has given consent, the automated telephone system confirms the distribution to the participant and advises the participant that he or she may request the confirmation on a written paper document that will be provided at no charge.

(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)(4) of this section. In addition, the automated telephone procedures of Plan D satisfy the requirements of paragraphs (c) and (d) of this section.

*Example 5. (i) Facts*. Same facts as *Example 4*, 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.* Like in *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)(4) of this section. Further, in this *Example 5*, the customer service telephone procedures of Plan D satisfy the requirements of paragraphs (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 and personal identification number (PIN). 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 N requests a distribution and receives the section 411(a)(11) notice from the plan administrator by reply e-mail. However, before Participant N elects a distribution, N terminates employment. Following termination of employment, Participant N 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 N is not effectively able to access the electronic medium used to make the participant election. Plan E must provide Participant N with the opportunity to transmit the participant election through another system that Participant N is effectively able to access, such as the automated telephone systems described in *Example 4* and *Example 5* of this paragraph (f).

**Par. 4.** 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 employee benefit arrangements.

**Par. 5.** 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 employee benefit arrangements.

(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(d) of this chapter for rules permitting the use of electronic media to transmit participant elections with respect to employee benefit arrangements.

**Par. 6.** Section 1.417(a)(3)-1 is amended by revising 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) \* \* \* A section 417(a)(3) explanation must be a written explanation. First class mail to the last known address of the participant is an acceptable delivery method for a section 417(a)(3) explanation. Likewise, hand delivery is acceptable. However, posting of the explanation is not considered provision of the section 417(a)(3) explanation. 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 employee benefit arrangements.

\* \* \* \* \*

**Par. 7.** 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 a 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 THE SOURCE REGULATIONS UNDER THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982**

**Par. 8.** The authority citation for part 35 continues to read, in part, as follows:

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

**Par. 9.** 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 employee benefit arrangements.

**PART 54—PENSION EXCISE TAXES**

**Par. 10.** The authority citation for part 54 continues to read, in part, as follows:

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

**Par. 11.** Section 54.4980F-1, Q&A-13, is amended as follows:

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

The revision reads 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 under a system that satisfies the applicable notice requirements of § 1.401(a)-21.

\* \* \* \* \*

**Mark E. Mathews,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 05-13911 Filed 7-13-05; 8:45 am]