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Practical Advice for Using Electronic Media to Disseminate Participant Notices, Disclosures, Elections, and Consents

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This article provides practical advice for plan sponsors and their service providers in using electronic media to disseminate participant notices, disclosures, elections, and consents. Included in the article are a side-by-side comparison of the IRS and DOL rules applicable to such disclosure and a chart that catalogs the regulatory requirements applicable to each type of document, along with a citation to and summary of the substantive rules that further limit the manner in which electronic media can be used to disseminate material.

The Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (IRC) require a number of participant notices, disclosures, elections, and consents to be made in writing. The Internal Revenue Service (IRS) and the Department of Labor (DOL) have each promulgated regulations that permit these documents to be disseminated electronically under certain conditions. Although the Pension Benefit Guaranty Corporation (PBGC) has promulgated regulations governing the use of electronic media to disseminate notices

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electronically,¹ no notice is provided to participants on a periodic basis under Title IV of ERISA.²

The IRS finalized its regulations in late 2006,³ and the DOL regulations were finalized in 2002. The principles underpinning both sets of regulations are similar, but the requirements under each set of regulations are different. Practical application of the different sets of regulations is difficult, especially when the IRS has regulatory and interpretive authority for certain sections of ERISA and the Internal Revenue Code (and the notices and disclosures required thereunder) and the DOL has regulatory and interpretive authority for other sections (and the notices, disclosures, elections, and consents required thereunder).⁴ Further complicating the matrix is the fact that the DOL's regulations function as a safe harbor, for which alternate electronic notice procedures may be permissible, whereas the IRS regulations act as the exclusive mechanism by which a required written notice, election, or consent can be made electronically. As an example of how tangled these rules can be, the DOL recently issued a field assistance bulletin stating plan sponsors may electronically disseminate periodic pension benefit statements (for which the DOL has regulatory authority) in compliance with the IRS final regulations.⁵ In addition, many of the new notices required under the Pension Protection Act must be "reasonably accessible"⁶ to the recipient if the notice is made electronically, which is a concept similar but not identical to the requirement under the IRS regulations that the recipient have the "effective ability to access" the electronic medium used to provide the notice.⁷

The goal of this article is to provide practical advice so that plan sponsors and their service providers can navigate these complex rules. The article analyzes the requirements under both the IRS and the DOL regulations by first reviewing the rules applicable to notices and disclosures and then reviewing the rules applicable to elections and consents. To highlight the different requirements applicable to notices and disclosures under each set of regulations, this article compares each regulation's requirements side-by-side in chart form in Figure 1, which begins on page 48. There is no side-by-side comparison for elections because there are no DOL regulations governing making elections and consents electronically, and the IRS regulations provide the only method for making elections and consents in an electronic medium. Finally, this article provides a chart (*see* Figure 2, which begins on page 53) that catalogs the notice, disclosure, elections, and consents that plan sponsors typically wish to make electronically, along with a citation to the regulation that governs the electronic dissemination of such document. In addition, Figure 2 lists any substantive rules from the statute or regulations, specific to that type of notice, disclosure, election, or consent, that further limit the manner in which

such notice, disclosure, election, or consent can be made electronically. Figure 2 includes the new notice requirements under the Pension Protection Act, along with the applicable effective dates.

THE IRS REGULATIONS—BACKGROUND

In late 2006, the IRS issued final regulations governing the use of electronic media to provide participant notices and disclosures and to obtain participant elections and consents.⁸ The final regulations reflect the provisions of the Electronic Signatures in Global and National Commerce Act (E-SIGN),⁹ and the regulations largely track the proposed regulations,¹⁰ with few exceptions. Under the regulations, electronic media include Web sites, electronic mail, telephonic systems, magnetic systems, and CD-ROM. The definition also includes electronic media concepts that are broadly defined, such that new media can be included within the regulation's scope.

The IRS regulations apply only to participant notices, consents, and elections for which the IRS has regulatory authority. The regulations do not affect any notice, elections, or consents for which the DOL or PBGC retains regulatory authority.¹¹ Examples of the types of notices, elections, and consents for which the IRS has regulatory authority and to which the IRS regulations apply include:

1. Rollover rights notice under IRC Section 402(f);
2. Benefit commencement rights notice under IRC Section 411(a)(11) (parallel provision in ERISA Section 203(e));
3. QJSA notice and waiver election under IRC Section 417 (parallel provision in ERISA Section 205);
4. Notice under IRC Section 3405(e)(10)(B) regarding right to elect not to have federal income tax withheld from periodic payments;
5. ERISA Section 204(h) notice of significant reduction in rate of future pension benefit accrual; and
6. Safe harbor notices for 401(k) plans utilizing the safe harbor to satisfy the nondiscrimination rules under IRC Section 401(k) and IRC Section 401(m), in lieu of ACP or ADP testing.

In addition to creating a new regulation section (Treas. Reg. § 1.401(a)-21) and making revisions to existing regulations, the IRS regulations contain a catch-all provision so that the regulations are applicable to all notices, elections, and consents that are required to be in written form or in writing (and for which the IRS has regulatory authority), without

regard to whether that other requirement specifically cross-references the regulations. Therefore, the IRS regulations will apply to the new notice requirements under the Pension Protection Act for which the IRS has regulatory authority. The IRS regulations provide the exclusive means by which plan sponsors can provide required notices electronically or accept required consents or elections that are made electronically.

One of the few changes made to the final regulations is that they now apply to individual retirement plans (*i.e.*, IRAs and Roth IRAs). The final regulations apply to any participant or beneficiary notice, consent, or election made electronically on or after January 1, 2007,¹² under any of the following plans or arrangements:

1. Plans qualified under IRC Section 401(a), IRC Section 403(a), or IRC Section 403(b);
2. Simplified employee pension (SEP) plans under IRC Section 408(k);
3. SIMPLE retirement plans under IRC Section 408(p);
4. Eligible governmental plans under IRC Section 457(b);
5. Individual retirement plans, including a Roth IRA under IRC Section 408A or a deemed IRA under IRC Section 408(q);
6. Accident or health plans or arrangements under IRC Section 104(a)(3) or IRC Section 105;
7. Cafeteria plans under IRC Section 125;
8. Educational assistance programs under IRC Section 127;
9. Qualified transportation fringe programs under IRC Section 132;
10. Archer medical savings accounts (MSAs) under IRC Section 220; and
11. Health savings accounts (HSAs) under IRC Section 223.

The IRS regulations do not affect or alter the content or timing requirements under IRC or ERISA or alter the substance of any other rule.¹³ The only purpose of the regulations is to provide a method for electronic communications to satisfy the requirements that certain notices, elections, or consents be made in writing. For example, the regulations do not eliminate the prohibition on providing ERISA Section 204(h) notices by oral communication or a recording of an oral communication. This prohibition is contained in the ERISA Section 204(h) regulations.¹⁴ Therefore, it is critical that plan sponsors and their

advisors continue to review the substantive requirements of each disclosure obligation to ensure appropriate compliance. (Figure 2, which begins on page 53, lists the substantive provisions that affect the dissemination of notices, elections, and consents by electronic media.)

For notices, elections, and consents, the IRS regulations require that the electronic system used be “reasonably designed to provide the information in the notice to a recipient in a manner that is no less understandable to the recipient than a written paper document.”¹⁵ Therefore, plan sponsors must consider the content of the notice and whether the electronic system used can appropriately convey the contents of the notice, such that the notice will be no less understandable than a written paper document. For example, it may not be appropriate to provide a long and detailed notice orally (*e.g.*, through a voice response system). The electronic system must identify the significance of the information in the notice and the subject matter of notice, along with any instructions need to access the notice.¹⁶ In order for any electronic notice to be given legal effect, it must also be maintained in a form that is capable of being retained and accurately reproduced for later reference.¹⁷

THE IRS REGULATIONS—NOTICES

The IRS regulations contain two methods for providing notices electronically: one method requires the recipient’s prior consent to receive notices electronically (the consumer consent method) and a second method (the alternative method) does not require prior consent.¹⁸

Consumer Consent Method

The consumer consent method follows the E-SIGN requirements that are applicable when a statute or regulation requires information to be provided to a consumer in writing.¹⁹ Oral communications or recordings of an oral communication do not qualify as electronic records under this method.²⁰ Therefore under the consumer consent method, plan sponsors cannot disseminate notices orally, whether by telephone, recorded messages, or voice response units.

Prior consent to receive electronic notices is required under the consumer consent method. Before making the consent, the individual must receive the following disclosures in a clear and conspicuous statement:

1. The right to receive a paper notice upon request, along with the procedures for requesting a paper copy and whether a fee will be charged for such paper copy;
2. The right to withdraw the consent, along with an explanation of the procedures for withdrawing the consent and

- any conditions, consequences, or fees in the event of withdrawal;
3. The scope of the consent, including to which transactions the consent will apply (*e.g.*, whether the consent only applies to the one transaction or to all transactions on a prospective basis until such consent is withdrawn);
 4. The procedures to update the recipient's electronic contact information; and
 5. Hardware or software requirements to access and retain the applicable notice.

The consent must be made in a manner that demonstrates that the recipient has the ability to access the electronic medium by which the notice will be made. For example, if the notice will be made on a Web site, the consent must be made in a manner that demonstrates that the recipient has the ability to access Web sites. There are two ways that a consent can demonstrate that the recipient can access the medium by which the notice will be made. First, the consent can be made electronically in the same medium in which the notice will be made (*e.g.*, electronic consent made on a Web site and the notice will be made on a Web site). In the alternative, the consent can be made in writing (or other medium that does not demonstrate the recipient's ability to access the medium in which the notice will be made) if the consent is confirmed in a manner that demonstrates that the recipient can access the applicable notice in the electronic medium in which it will be made (*e.g.*, written consent made by participant on first day of employment, with confirmation of consent made by email when email will be the manner in which the notice will be made).

The consent is no longer effective if withdrawn before the applicable notice is delivered. If a consent is withdrawn, no fee, condition, or consequence can be imposed if it was not previously disclosed as part of the prior consent. In addition, a consent is no longer effective if the hardware or software requirements change in such a manner that "create[s] a material risk that the recipient will not be able to access or retain the applicable notice in electronic format," in which case a new consent must be obtained before the electronic notice is disseminated.

Alternative Method

Under the alternative method²¹ for providing notices electronically, no prior consent is required and no disclosures are required to be made in advance of making the notice electronically. The only

requirements under this method are: (1) the recipient must have an “effective ability to access” the medium used to provide the notice; (2) at the time the notice is provided, the recipient must be advised of the right to receive a free paper copy of the notice; and (3) if requested, the paper copy of the notice must be provided at no charge. Whether a recipient has an “effective ability to access” the medium is determined based on the surrounding facts and circumstances. Unlike the consumer consent method, the alternative method allows electronic notices to be provided orally, although plan sponsors are still subject to the requirement that the medium chosen to disseminate the notice must be no less understandable than a written document. Therefore, disseminating a long or detailed notice through a recorded message may not be appropriate.

Plan sponsors largely prefer the alternative method because it does not require prior consent and because oral communications may be used. Nevertheless, there can be instances where the consumer consent method may be preferable if the plan sponsor does not know if a participant has the “effective ability to access” the electronic medium. In particular, the consumer consent method may be preferred for participants who do not have access to computers in the workplace or for notices made to alternate payees or inactive participants, as the sponsor may not know if these populations have the effective ability to access an electronic medium.

DOL REGULATIONS—BACKGROUND

Finalized in 2002,²² the DOL regulations apply to notices and disclosures for which the DOL has regulatory authority under Title I of ERISA, including: summary plan descriptions, summary annual reports, pension benefit statements, and the COBRA rights notice. The DOL regulations apply to a smaller group of benefit plans and arrangements: only those qualified plans covered by Title I of ERISA. Whereas the IRS regulations are the exclusive method for providing notices electronically that are required by statute or regulation to be made in writing, the DOL regulations function as a safe harbor to satisfy the disclosure obligations that certain documents be provided in writing. Under the DOL regulations, other methods of providing notices electronically may be permissible.

The DOL regulations contain a number of requirements that are different from the IRS regulations. First, in order for a plan administrator to use electronic media under the DOL safe harbor, the administrator must take “appropriate and necessary steps calculated to ensure that the system . . . results in actual receipt of [the] transmitted information.”²³ The DOL regulations require that the system result in actual receipt, and the IRS regulations do not

have this requirement. Instead, the IRS regulations require that the recipient have effective access to the electronic medium through which the notice will be made. Methods to ensure actual receipt under the DOL regulations include using electronic return receipts, the receipt of notices of undelivered electronic mail, or conducting periodic reviews or surveys to confirm receipt of the transmitted information. Unlike the IRS regulations, the DOL regulations include a specific requirement that the electronic system protect the confidentiality of personal information relating to an individual's account and benefits.

The IRS and DOL regulations share some common requirements. Both regulations require individuals to be able to receive a paper version of the electronic document (and receive notice of such right). The DOL regulations permit plan sponsors to charge a fee to receive a paper version of the electronic document, unless the statute requires that the document be provided without charge (*e.g.*, SPDs, SMMs). Nevertheless, the IRS regulations permit plan sponsors to charge a fee for a paper version of an electronic notice only under the consumer consent method and only when the participant was informed of the charge at the time of his or her prior consent.

Both regulations require that a notice be provided to the recipient regarding the significance of the electronic document being disseminated. The DOL regulations differ from the IRS regulations in that the "significance" notice can be provided in either electronic or non-electronic form, and the "significance" notice need not be provided under the DOL regulations if the significance of the electronic document is reasonably evident. Both sets of regulations require that the substance and timing of electronic notices conform to the requirements applicable to written documents. However, the DOL regulations do not require that paper versions of notices and disclosures be identical to the electronic notice, as long as the content and format requirements for the applicable notice are satisfied.

DOL REGULATIONS—NOTICE AND DISCLOSURE

The DOL regulations contain two sets of rules for providing electronic notices and disclosures. Generally speaking, there is one set of rules for participants who have the ability to "effectively access" documents furnished in electronic form at the location where they work²⁴ if access to the employer or plan sponsor's electronic information system is an integral part of those duties.²⁵ For such active participants, no prior consent is required.

There are different rules for inactive participants, nonemployees who are entitled to receive notices and disclosure (*e.g.*, beneficiaries and alternate payees), and active employees and others who

do not have effective access to documents furnished in the electronic form at the location where they work or for whom access to the electronic information system is not an integral part of their employment with the plan sponsor or employer (*e.g.*, factory workers who do not work with a computer). For this latter group, prior consent is required, and consumer consent requirements similar to those under E-SIGN and the IRS regulations apply. The consent (or confirmation of such consent) must be made in a manner that reasonably demonstrates the individual's ability to access information in the electronic form that will be used. The individual must also provide an address for the receipt of electronically furnished documents. Prior to making the consent, the individual must also receive a clear and conspicuous statement indicating:

1. The types of documents to which the consent would apply;
2. That consent can be withdrawn at any time without charge;
3. The procedures for withdrawing consent and for updating the participant's, beneficiary's, or other individual's address for receipt of electronically furnished documents or other information;
4. The right to request and obtain a paper version of an electronically furnished document, along with information regarding whether the paper version will be provided free of charge; and
5. Any hardware and software requirements for accessing and retaining the documents.

If there is a change in the hardware or software requirements to access or retain electronic documents and such change creates a material risk that the individual will be unable to access or retain the electronically furnished documents, a new consent must be obtained. In addition, the individual must be provided with a statement of the revised hardware or software requirements. In the event of a change in hardware or software requirements, the individual must be given the right to withdraw the consent without charge and without imposition of any condition or consequence that was not disclosed at the time of the initial consent.

Comparison of DOL and IRS Regulations Applicable to Notices and Disclosures Made Electronically

Figure 1 provides a side-by-side comparison of the key provisions contained in the DOL and IRS regulations.

Figure 1. Side-by-Side Comparison of DOL and IRS Key Provisions

	2002 DOL Regulations—Safe Harbor Rule for Active Employee-Participants with Access to Technology at Work Location	2002 DOL Regulations—Safe Harbor Rule for All Other Participants and Individuals Entitled to Receive Notices under Title I of ERISA	2006 IRS Regulations—Consumer Consent Method	2006 IRS Regulations—Alternative Method
Plans to Which Rule Applies	Employee pension benefit plans Employee welfare benefit plans	Employee pension benefit plans Employee welfare benefit plans	Retirement plans under IRC § 401(a), 403(a), or 403(b) SIMPLE retirement plans Eligible governmental plans under IRC § 457(b) Individual retirement plans Accident or health plans or arrangements under IRC § 104(a)(3) or 105 cafeteria plans Educational assistance programs Qualified transportation fringe programs Archer MSAs HSAs	Retirement plans under IRC § 401(a), 403(a), or 403(b) SIMPLE retirement plans Eligible governmental plans under IRC § 457(b) Individual retirement plans Accident or health plans or arrangements under IRC § 104(a)(3) or 105 cafeteria plans Educational assistance programs Qualified transportation fringe programs Archer MSAs HSAs
Examples of Notices to which Rule Applies	SPDs SMMs SARs COBRA rights notice Annual defined benefit plan funding notice Suspension of benefits notice	SPDs SMMs SARs COBRA rights notice Annual defined benefit plan funding notice Suspension of benefits notice	Rollover rights notice 204(h) notice QJSA notice 401(k) safe harbor notice Automatic enrollment notice for 401(k) plans	Rollover rights notice 204(h) notice QJSA notice 401(k) safe harbor notice Automatic enrollment notice for 401(k) plans

	2002 DOL Regulations—Safe Harbor Rule for Active Employee-Participants with Access to Technology at Work Location	2002 DOL Regulations—Safe Harbor Rule for All Other Participants and Individuals Entitled to Receive Notices under Title I of ERISA	2006 IRS Regulations—Consumer Consent Method	2006 IRS Regulations—Alternative Method
System Requirements	Confidentiality of personal information required	Confidentiality of personal information required	System must be reasonably designed to provide notice in a manner no less understandable than written paper document	System must be reasonably designed to provide notice in a manner no less understandable than written paper document
Access Standards	System must result in actual receipt of information Participant must have ability to effectively access electronic documents at work location and access to the employer or plan sponsor's electronic information system must be an integral part of the participant's job duties	System must result in actual receipt of information Consent (or confirmation of consent) must be made in manner demonstrating ability to access electronic medium in which notice will be made	Consent (or confirmation of consent) must be made in manner demonstrating ability to access electronic medium in which notice will be made	Individual must have effective ability to access medium used to provide notice
Limitations on Types of Recipients Who Can Receive Electronic Notices Under Applicable Methods	Yes. Active participants only, subject to restrictions described in Access Standards summary above	None	None	None
Prior Affirmation Consent From Recipient Required Before Using Electronic Medium for Notice?	No	Yes. Consent (or confirmation of consent) must be made in manner demonstrating ability to access	Yes. Consent (or confirmation of consent) must be made in manner demonstrating ability to access	No

	2002 DOL Regulations—Safe Harbor Rule for Active Employee-Participants with Access to Technology at Work Location	2002 DOL Regulations—Safe Harbor Rule for All Other Participants and Individuals Entitled to Receive Notices under Title I of ERISA	2006 IRS Regulations—Consumer Consent Method	2006 IRS Regulations—Alternative Method
		<p>Electronic medium in which notice will be made</p> <p>Prior disclosures before consent made:</p> <ul style="list-style-type: none"> • description of scope of the consent • right to withdraw consent without charge • procedures for withdrawing consent and updating address for receipt of electronic documents • right to paper version of notice and whether fee will be charged for paper version • hardware/software requirements (new consent required if change in hardware/software requirements) 	<p>Electronic medium in which notice will be made</p> <p>Prior disclosures before consent made:</p> <ul style="list-style-type: none"> • description of scope of the consent • right to withdraw consent without charge • procedures for withdrawing consent and updating address for receipt of electronic documents • right to paper version of notice and whether fee will be charged for paper version • hardware/software requirements (new consent required if change in hardware/software requirements) 	
Oral Communications Permitted (including recordings and voice response units)?	Yes	No	No	Yes

	2002 DOL Regulations—Safe Harbor Rule for Active Employee-Participants with Access to Technology at Work Location	2002 DOL Regulations—Safe Harbor Rule for All Other Participants and Individuals Entitled to Receive Notices under Title I of ERISA	2006 IRS Regulations—Consumer Consent Method	2006 IRS Regulations—Alternative Method
Must the Electronic System Alert the Recipient to the Significance of the Notice?	Yes, unless reasonably evident	Yes, unless reasonably evident	Yes	Yes
Must the Notice Describe the Right to Receive a Paper Version of the Notice?	Yes	No (right is described in disclosures provided prior to making consent to receive notices electronically)	No (right is described in disclosures provided prior to making consent to receive notices electronically)	Yes
Does the Recipient Have the Right to Receive a Paper Version of the Notice?	Yes	Yes	Yes	Yes
Can a Fee Be Charged for the Paper Version of the Notice?	Yes. Fee can be charged unless statute requires document be provided without charge	Yes. Fee can be charged if disclosed at time of consent	Yes. Fee can be charged if disclosed at time of consent	No. Fee cannot be charged

THE IRS REGULATIONS—PARTICIPANT ELECTIONS AND CONSENTS

The dissemination of participant elections and consents through electronic media is governed by the IRS regulations, which were finalized in the fall of 2006. The IRS regulations generally retain the requirements in the proposed regulations.²⁶ Although the DOL and IRS regulations provide multiple methods for providing notices and disclosures electronically, the IRS regulations only provide one method for electronically making elections and consents that are required by statute or regulation to be in writing.

There are four requirements for elections and consents to be made electronically. First, the person making the election must have an “effective ability to access” the medium used to make the election. If the

individual does not have an “effective ability to access” the medium, the regulations provide that no valid election will have been made with respect to that individual. If a participant has an effective ability to access the electronic medium, the plan sponsor is not required to offer a paper method of making the election. The electronic election can be the sole method of making elections, in such instances. Second, the electronic system used must be reasonably designed to preclude unauthorized persons from making elections (*i.e.*, access must be authenticated). Passwords and personal identification numbers (PINs) will normally satisfy this requirement, but special circumstances arise where there may be conflicts of interest between the persons making elections. For instance, an election to waive the qualified joint and survivor annuity form of benefit could raise authentication concerns with respect to the spousal consent. Third, the electronic system must provide a reasonable opportunity for the election to be confirmed, modified, or rescinded before the election becomes effective. Finally, a confirmation of the election (and its effect under the terms of the plan or arrangement) must be made within a reasonable time. The confirmation can be made by paper document or made electronically under either of the two methods for providing notices electronically under the IRS regulations (*i.e.*, the consumer consent method or the alternative method).

The final regulations do not change the requirements that certain elections (including spousal consents) must continue to be witnessed before a plan representative or notary public.²⁷ Although the election must still be witnessed in the physical presence of the notary or plan representative, the notarization or witnesses may be acknowledged electronically, to the extent permitted by state law.²⁸

IRS SAFE HARBOR FOR NOTICES AND ELECTIONS THAT ARE NOT REQUIRED TO BE IN WRITING

The IRS regulations apply only to those notices and elections that are required by statute or regulation to be in writing. For notices and elections that are not required to be in writing, the IRS regulations function as a safe harbor. Examples of types of notices and elections that are not required to be in writing include plan enrollment forms, designating rates of elective contributions, designating beneficiaries (other than designations requiring spousal consent), electing direct rollovers, and electing or changing investment allocations. Plan sponsors can rely on the final regulations as safe harbors for making such notices or elections electronically.

Figure 2 identifies which regulation applies to commonly provided notices, disclosures, elections, and consents. It also contains a summary of additional rules that affect the electronic delivery of such items.

Figure 2

Notice/Election/Disclosure Obligation	Regulation(s) Governing Dissemination Through Electronic Media	Additional Rules Governing Electronic Dissemination Which Are Specific to the Type of Notice
Notices Applicable to All Plans		
Summary plan description (SPD)	DOL Regulations Lab. Reg. § 2520.104b-1(c)	None
Summary annual report The Pension Protection Act repealed the summary annual report requirement for defined benefit plans, effective for plan years beginning after December 31, 2007.	DOL Regulations Lab. Reg. § 2520.104b-1(c) Lab. Reg. § 2520.1031-3(b)(3)	None
Notice of adverse determination (denied claim)	DOL Regulations Lab. Reg. § 2520.104b-1(c) Lab. Reg. § 2560.503-1(g)(1)	None
Notice of benefit determination on review (appealed claim)	DOL Regulations Lab. Reg. § 2520.104b-1(c) Lab. Reg. § 2560.503-1(j)	None
Notice of pendency of proposed prohibited transaction exemption	DOL Regulations Lab. Reg. § 2520.104b-1(c)	None
Notices, Consents, and Elections Applicable to All Retirement Plans		
Periodic pension benefit statements, including alternative notice for defined benefit plans Effective for plan years beginning after December 31, 2006 (delayed effective date for some plans maintained pursuant to a collective bargaining agreement)	DOL Regulations Lab. Reg. § 2520.104b-1(c) (see also Field Assistance Bulletin 2006-03) ERISA § 105(a)(2)(A), 3(A), as added by Pension Protection Act	Under statute, statement may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant or beneficiary. Under Field Assistance Bulletin 2006-03, dissemination of periodic pension benefit statements in compliance with the methods outlined in the IRS Regulations will constitute as good-faith compliance with the requirement to furnish pension benefit statements to participants and beneficiaries. Plans that provide continuous access to benefit statement information online will satisfy the disclosure

Notice/Election/Disclosure Obligation	Regulation(s) Governing Dissemination Through Electronic Media	Additional Rules Governing Electronic Dissemination Which Are Specific to the Type of Notice
		obligation if participants and beneficiaries are notified as to the availability of the online statement information and instructions on how to access the information. Participants and beneficiaries must also be informed of the ability to request and receive a paper version of the statement free of charge. Such notification must be made in advance of when the benefit statement is due and annually thereafter.
Withholding notice	IRS Regulations Treas. Reg. § 1.401(a)-21 Treas. Reg. § 35.3405-1 d-35	None
Rollover rights notice	IRS Regulations Treas. Reg. § 1.401(a)-21 Treas. Reg. § 1.402(f)-1 Q&A-5	None
Distribution rights notice	IRS Regulations Treas. Reg. § 1.401(a)-21 Treas. Reg. § 1.411(a)-11(f)(1)	None
Consent to distribution	IRS Regulations Treas. Reg. § 1.401(a)-21 Treas. Reg. § 1.411(a)-11(f)(2)	None
QJSA notice	IRS Regulations Treas. Reg. § 1.401(a)-21 Treas. Reg. § 1.417(a)(3)-1(a)(3)	None
QJSA election	IRS Regulations Treas. Reg. § 1.401(a)-21 Treas. Reg. § 1.417(a)(3)-1	Waiver of the QJSA form of benefit by a spouse must be witnessed in person by a notary public or plan representative
Qualified domestic relations (QDRO) notification	IRS Regulations Treas. Reg. § 1.401(a)-21	None
Notice to interested parties	IRS Regulations Treas. Reg. § 1.401(a)-21 Treas. Reg. § 1.7476-2(c)(2)	None
Notices, Consents, and Elections Applicable to Defined Benefit Retirement Plans		
Annual defined benefit funding notice Effective for plan years beginning after December 31, 2007. Note that annual funding notice for	DOL Regulations Lab. Reg. § 2520.104b-1(c)	Under statute, notice may be provided in written, electronic, or other appropriate form to the extent such form is reasonably accessible to persons to whom the notice

Practical Advice for Using Electronic Media

Notice/Election/Disclosure Obligation	Regulation(s) Governing Dissemination Through Electronic Media	Additional Rules Governing Electronic Dissemination Which Are Specific to the Type of Notice
multiemployer plans under ERISA Section 4011 was repealed by the Pension Protection Act for plan years beginning after December 31, 2006.	ERISA § 101(f)(4)(C), as added by the Pension Protection Act	is required to be provided.
A 204(h) notice of significant reduction in rate of future pension benefit accrual	IRS Regulations Treas. Reg. § 1.401(a)-21 Treas. Reg. § 54.4980F-1	<p>A 204(h) notice cannot be delivered by oral communication or a recording of an oral communication.</p> <p>Regulations require that electronic 204(h) notices be actually received by the recipient OR the plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the method of delivery ensures actual receipt</p> <p>Note: Although the IRS electronic media regulations are applicable to Section 204(h) notices, the substantive regulations applicable to Section 204(h) notices contain electronic dissemination requirements that are similar to the DOL electronic media regulations (e.g., actual receipt requirement).</p>
Suspension of benefit notice	DOL Regulations Lab. Reg. § 2520.104b-1(c)	None
Single employer notice of benefit limitations on underfunded defined benefit plans (suspension of lump-sum payments and limitations on plan amendment and accruals)	DOL Regulations ¹ Lab. Reg. § 2520.104b-1(c) ERISA § 101(j), as added by the Pension Protection Act	Under statute, notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.
<p>1. The notice requirement appears in part 1 of Title I of ERISA, for which the DOL has regulatory authority. Therefore, the DOL electronic notice requirements should apply. Nevertheless, the statute states that the Secretary of Treasury may designate when the notice must be provided, in addition to the notice events specified in the statute.</p>		

Notice/Election/Disclosure Obligation	Regulation(s) Governing Dissemination Through Electronic Media	Additional Rules Governing Electronic Dissemination Which Are Specific to the Type of Notice
Effective for plan years beginning after December 31, 2007 (delayed effective date for some plans maintained pursuant to a collective bargaining agreement)		
Single-employer notice to participants of failure to make required contributions to defined benefit plan Effective for plan years beginning after December 31, 2007	DOL Regulations Lab. Reg. § 2520.104b-1(c) ERISA § 101(d), as added by the Pension Protection Act	None
Notice of transfer of excess pension assets to retiree health plan	DOL Regulations Lab. Reg. § 2520.104b-1(c)	None
Notices Applicable Only to Multiemployer Defined Benefit Retirement Plans		
Multiemployer notice of reduction of adjustable benefits in defined benefit plan Effective for plan years beginning after 2007	IRS Regulations Treas. Reg. § 1.401(a)-21 ERISA § 305(e)(8)(C), as added by the Pension Protection Act	Under statute, notice may be provided in written, electronic, or other appropriate form to the extent such form is reasonably accessible to persons to whom the notice is required to be provided.
Multiemployer actuarial report; quarterly, semi-annual, or annual financial report prepared by investment manager, advisor, or other fiduciary; application to extend amortization period Effective for plan years beginning after December 31, 2007	DOL Regulations Lab. Reg. § 2520.104b-1(c) ERISA § 101(k)(2)(B), as added by Pension Protection Act	Under statute, notice may be provided in written, electronic, or other appropriate form to the extent such form is reasonably accessible to persons to whom the notice is required to be provided.
Notice of reduction of "adjustable benefits" under multiemployer plan	IRS Regulations Treas. Reg. § 1.401(a)-21 ERISA § 305(e)(8)(C)(iii)(III), as added by Pension Protection Act Please note that the IRS is to issue regulations on this notice requirement.	Notice may be provided in written, electronic, or other appropriate form to the extent such form is reasonably accessible to persons to whom the notice is required to be provided.

Notice/Election/Disclosure Obligation	Regulation(s) Governing Dissemination Through Electronic Media	Additional Rules Governing Electronic Dissemination Which Are Specific to the Type of Notice
Notices Applicable Only to Defined Contribution Retirement Plans		
ERISA Section 404(c) disclosure for participant-directed individual accounts	DOL Regulations Lab. Reg. § 2520.104b-1(c)	None
Notice of freedom to divest employer securities Effective for plan years beginning after December 31, 2006	DOL Regulations Lab. Reg. § 2520.104b-1(c) ERISA § 101(m), as added by the Pension Protection Act	Under statute, notice may be delivered in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to the recipient.
Automatic 401(k) enrollment Effective for plan years beginning after December 31, 2006	IRS Regulations Treas. Reg. § 1.401(a)-21 IRC § 401(k)(13)(E), as added by Pension Protection Act	None
Qualified default investment notice Effective for plan years beginning after December 31, 2007	DOL Regulations Lab. Reg. § 2520.104b-1(c) ERISA § 404(c)(5)(B), as added by Pension Protection Act	None
Disclosure regarding investment advice by fiduciary adviser Effective for advice provided after December 31, 2006	DOL Regulations Lab. Reg. § 2520.104b-1(c) ERISA § 1108(g)(6)(A) and IRC § 4975(f)(8)(F)(i), as added by Pension Protection Act	Under statute, notice may be made by means of electronic communication.
Safe harbor notices for 401(k)/401(m) plans	IRS Regulations Treas. Reg. § 1.401(a)-21 Treas. Reg. § 1.401(k)-3(d)(1) Treas. Reg. § 1.401(m)-3	None
Blackout notices	DOL Regulations Lab. Reg. § 2520.104b-1(c) Lab. Reg. § 2520.101-3(b)(3) ERISA § 101(i)(2)(D)	Under statute, notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.
Plan loans—enforceable agreement requirement	IRS Regulations Treas. Reg. § 1.401(a)-21 Treas. Reg. § 1.72(p)-1 Q&A 3(b)(2)	None

Notice/Election/Disclosure Obligation	Regulation(s) Governing Dissemination Through Electronic Media	Additional Rules Governing Electronic Dissemination Which Are Specific to the Type of Notice
Notices Applicable Only to Health and Welfare Plans		
Notice of COBRA rights	DOL Regulations Lab. Reg. § 2520.104b-1(c) Lab. Reg. § 2590.606-1(f) Lab. Reg. § 2590.606-4(f)	None
Summary of Material Reduction (SMR) in covered services or benefits	DOL Regulations Lab. Reg. § 2520.104b-1(c)	None
Qualified Medical Child Support Order (QMCSO) notifications	DOL Regulations Lab. Reg. § 2520.104b-1(c)	None
HIPAA certificate of creditable coverage	DOL Regulations Lab. Reg. § 2520.104b-1(c) Lab. Reg. § 2590.701-5(a)(4)	None

NOTES

1. See PBGC Reg. §§ 4000.14, 4000.29.
2. The Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006), repealed the only notice provided periodically to participants under Title IV, which was an underfunding notice. See ERISA § 4011. In its place, the Pension Protection Act added a new funding notice requirement under Section 101(f) of ERISA, for which the DOL has regulatory authority and to which the DOL's regulations governing the use of electronic media apply. As most plan sponsors will not periodically disseminate any participant notice for which the PBGC has regulatory authority, the PBGC's rules governing the use of electronic media are not discussed in this article. *But see* ERISA §§ 4041(c)(2)(D)(iii), 4042(c)(3)(D), as added by the Pension Protection Act, which require the disclosure of certain termination information to plan participants in the event of a distress or involuntary termination. Under the statute, the PBGC can prescribe the form and manner of disclosure of this information, which shall include electronic or other appropriate forms, to the extent reasonably accessible to individuals to whom the information is required to be provided. Interestingly, the plan administrator can charge to provide this information, unless it is provided electronically. This requirement is effective for notices applicable to distress and involuntary terminations if such notices are made after November 15, 2006.
3. Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents, 71 *Fed. Reg.* 61877 (Oct. 20, 2006), also printed as T.D. 9294, 2006-48 I.R.B. 980 (Nov. 27, 2006).
4. Pub. L. No. 106-22, 114 Stat. 464 (2000), codified at 15 U.S.C. § 7001, *et seq.*
5. See, e.g., Reorganization Plan No. 4 of 1978.
6. See Field Assistance Bulletin 2006-03.
7. See, e.g., ERISA § 105(a)(2)(A) (periodic pension benefit statements); ERISA § 101(f)(4)(C) (annual defined benefit funding notice); ERISA § 101(m) (notice of

freedom to divest employer securities).

8. In 2000, the IRS released its first set of regulations applicable to disclosure through electronic media. *See* *New Technologies in Retirement Plans*, 65 *Fed. Reg.* 6001 (Feb. 8, 2000) (regulations now superseded). The 2000 regulations required that the electronic medium used be “reasonably accessible.” The 2006 regulations replace the “reasonable accessible” requirement with an “effective ability to access” the electronic medium requirement. The change is not intended to be substantive and was made so as to avoid confusion with DOL regulations interpreting the words “reasonably accessible” as used in ERISA § 101(i)(2)(D), related to the required blackout notices required after *Sarbanes-Oxley*. *See* Preamble to IRS Final 2006 Regulations, 71 *Fed. Reg.* 61881.

9. *See* *Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents*, 71 *Fed. Reg.* 61877 (Oct. 20, 2006), also printed as T.D. 9294, 2006-48 I.R.B. 980 (Nov. 27, 2006).

10. Pub. L. No. 106-22, 114 Stat. 464 (2000).

11. *See* *Use of Electronic Technologies for Providing Employee Benefit Notices and Transmitting Employee Benefit Elections and Consents*, 70 *Fed. Reg.* 40675 (proposed July 14, 2005), also printed as REG-138362-04, 2005-33 I.R.B. 299 (Aug. 15, 2005).

12. *Treas. Reg.* § 1.401(a)-21(a)(3).

13. The regulations are effective as of January 1, 2007. However, any prior practice between October 1, 2000, and January 1, 2007, that conformed with the final regulations will satisfy the statutory or regulatory requirement that the notice, election, or consent be in writing.

14. *See* *Treas. Reg.* § 1.401(a)-21(a)(4).

15. *See* *Treas. Reg.* § 54.4980F-1, A-13(c)(1).

16. *Treas. Reg.* § 1.401(a)-21(a)(5)(i).

17. *Treas. Reg.* § 1.401(a)-21(a)(5)(ii).

18. *Treas. Reg.* § 1.401(a)-21(a)(3)(ii).

19. The first method conforms to the requirements under E-SIGN for consumer protection notices. The second “alternative” method is made under E-SIGN § 104(d)(1), 15 U.S.C. § 7004(d)(1), which authorizes a federal regulatory agency to exempt a specified category or type of record from the consumer consent requirements under E-SIGN § 101(c), but 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.

20. *See* E-SIGN § 101(e), 15 U.S.C. § 7001(e).

21. E-SIGN § 101(c), 15 U.S.C. § 7001(c).

22. The alternative method largely follows the IRS electronic media regulations issued in 2000, which applied to a more limited set of notices than the 2006 regulations. *See* *New Technologies in Retirement Plans*, 65 *Fed. Reg.* 6001 (Feb. 8, 2000) (regulations now superseded).

23. *Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans*, 67 *Fed. Reg.* 17263 (Apr. 9, 2002).

24. *Lab. Reg.* § 2520.104b-1(c)(1)(i)(A).

25. This definition is intended to include those who work remotely, whether from home or while traveling, to the extent such employees have access to the electronic system. *See* Preamble to Final DOL Regulation, 67 *Fed. Reg.* 17264, 17265 (Apr. 9, 2002).

26. Lab. Reg. § 2520.104b-1(c)(2).

27. *See* Use of Electronic Technologies for Providing Employee Benefit Notices and Transmitting Employee Benefit Elections and Consents, 70 *Fed. Reg.* 40675 (proposed July 14, 2005), also printed as REG-138362-04, 2005-33 I.R.B. 299 (Aug. 15, 2005).

28. The IRS has acknowledged that the physical presence requirement limits the utility of using electronic media to make elections and consents. Nevertheless, the regulation delegates authority to the IRS Commissioner (outside of the rulemaking process) to provide that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement if the procedures provide the same safeguards for participant elections as are provided through the physical presence requirement.

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