ACTUARIAL BENEFITS & DESIGN COMPANY

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Delivery of Participant Notices

Traditionally, plan communications were required to be in writing, with personal delivery. Today, there are many ways to deliver a notice, but the electronic method is perhaps the largest growing method for plan delivery of important communication material. But, here in 2008, I challenge you to determine how to best deliver communication material. This is where we are going – thinking and acting more "green" while meeting the disclosure rules.

The workforce is aging; those individuals entering the workforce are used to learning and engaging in a meaningful dialog in a very visual way. Employers who really want to be ahead of the curve or on the cutting edge of tomorrow offer podcasts to encourage deliver of very specific information – reading is not the ideal way for these GenY and even GenX workers to become engaged in the dialog.

The Written Word – The Way We Were

No matter how you deliver it, the communication will always be written. Even a podcast begins with a script. PPA 2006 requires more of a plain English focus for the writings that perhaps ever before demanded in legislation. Lawyers need to verify content but public relations people need to write the content.

The written word was altered in a dramatic way in the year 2000 when everyone was concerned about whether their computer would recognize a new century beginning with 2 and ending with 0. On June 30, 2000, President Clinton signed into law the "Electronic Signatures in Global and National Commerce Act" (E-Sign Act). The E-Sign Act generally gives electronic signatures the same legal effect as their handwritten/typed/printed counterparts. In 2006, the IRS issued final regulations regarding electronic delivery for ERISA and other employee benefit notices. These regulations recognized the provisions of the E Sign Act and embraced their application to delivery of plan communication.

Historical References.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

Final regulations relating to the use of electronic media for transmissions of participant notices and consents under IRC §§402(f), 411(a)(11), and 3405(e)(10)(B) were published on February 8, 2000 (the 2000 regulations). The 2000 regulations set forth standards for the electronic transmission of certain notices and consents that are required in connection with **distributions from retirement plans**.

Those regulations provide that a plan may provide a notice required under IRC §§402(f), 411(a)(11), or 3405(e)(10)(B) either on a written paper document or electronic medium that is **reasonably accessible to the participant and reasonably designed to provide the notice in a manner no less understandable to the participant than a written paper document**. Also, the participant must be told he could request and receive a paper copy of the written paper document at no charge.

The 2000 regulations also permit an electronic system to satisfy the requirement of IRC §411(a)(11) that a participant provide written consent to a distribution if certain requirements are satisfied. **The 2000 regulations did not permit the use of electronic media for any notice or election required under IRC §417 with respect to a waiver of a qualified joint and survivor annuity** (QJSA).

The Treasury Department and IRS issued other guidance applying the standards set forth in the 2000 regulations to other retirement plan notices and elections. Regulation §1.7476-2(c)(2) provides that a **notice to an interested party** is deemed to be provided in a manner that satisfies the delivery requirements of §1.7476- 2(c)(1) if the notice is delivered using an electronic medium under a system that satisfies the requirements of IRC §402(f)- 1, Q&A-5 of Notice 2000-3.

Question and Answer 7 of Notice 2000-3 provides that, until the issuance of further guidance, a plan is permitted to use electronic media to provide notices required under IRC §§401(k)(12) and 401(m)(11) (relating to **safe harbors for section 401(k) and section 401(m)** plans) if certain requirements were met. Similarly, Treas. Reg.§1.72(p)-1, Q&A-3(b), requires a **loan** from a plan to a participant be set forth in a written paper document, in an electronic medium that satisfies standards that are the same as the standards in the 2000 regulations, or in such other form as may be approved by the Commissioner.

In addition, Notice 99-1 provides guidance relating to qualified retirement plans permitting the use of electronic media for plan participants or beneficiaries conducting **account transactions** for which there is no specific writing requirement, such as plan enrollments, direct rollover elections, beneficiary designations, investment change allocations, elective and after-tax contribution designations, and general plan or specific account inquiries.

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

Department of Labor (DOL) and the Pension Benefit Guaranty Corporation (PBGC). The DOL and PBGC 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. DOL Reg.§2520.104b-1.

Generally, the 2002 DOL regulations do not apply to participant elections or the joint and survivor annuity requirements.

However, the DOL rules do give certain requirements for consent for electronic distribution, unless the participant has the reasonable ability to access electronic documents at work. Kiosk concept is not available to satisfy the DOL rules. Alternatively, the participant must affirmatively consent to receive electronic notices in a manner that demonstrates his or her ability to access the information. The DOL requires the following to be contained in the information provided to the participant:

1. identification of the documents to which the consent applies;
2. explanation that the consent may be withdrawn at any time;
3. procedures to withdraw consent or make modifications to address;
4. right to request paper document at no charge; and
5. the hardware and software requirements to access the information.

Final Treasury Regulations in 2006. On July 14, 2005, the Treasury Department and IRS issued proposed regulations and these were made final and published on October 26. 2006. The final regulations add §1.401(a)-21 and modify a number of existing regulations (including the 2000 regulations and some of the other regulations described above). These regulations set forth the standards by which a retirement plan, an employee benefit arrangement, or an individual retirement plan is permitted to use an electronic method to provide applicable notices or for individuals in such a plan to make participant elections.

For any requirement under the IRC or regulations that an employee benefit notice or election be in writing or in written form, the standards set forth in these regulations are generally the exclusive rules for providing such communication through the use of an electronic medium.

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

The 2006 Treasury Regulations (hereinafter referred to as the "regulations" to distinguish them from the 2000 regulations) are the main source for guidance and apply to any notice, election, or similar communication provided to or made by a participant or beneficiary in the following retirement plans: A section 401(a) plan; a section 403(a) plan; a section 403(b) plan; a simplified employee pension (SEP) under section 408(k); a simple retirement plan under section 408(p); and an eligible governmental plan under section 457(b). They also apply to any notice, election, or similar communication provided to or made by an individual entitled to benefits in an IRA, including a Roth IRA under IRC§ 408A or a deemed IRA under IRC§408(q).[i]

Note: The regulations do not apply to any notice, election, consent, disclosure, or obligation required under Title I or IV of ERISA over which the DOL or PBGC has interpretative and enforcement authority. For example, §2520.104b-1 of the DOL Regulations apply with respect to an employee benefit plan furnishing disclosure documents, such as a summary plan description or a summary annual report. Nor do these regulations apply to §411(a)(3)(B) (relating to suspension of benefits), §4980B(f)(6) (relating to an individual's COBRA rights), or any other Code provision over which the DOL or the PBGC has similar interpretative authority.

In addition, the rules in these regulations apply only with respect to notices and elections about a participant's rights under a retirement plan and do not apply with respect to other requirements under the Code, such as requirements relating to tax reporting, maintaining tax records, or substantiation of expenses.

Requirements for Using Electronic Media to Provide Notices and Make Elections

Any communication that is electronically provided must satisfy all the otherwise applicable requirements (including the applicable timing and content rules) relating to that communication. Any electronic system used to provide a notice or to make an election must satisfy certain requirements.

1. First, with respect to the content of an applicable notice, the electronic system must be reasonably designed to provide the information to a recipient in a manner no less 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. However, a plan with few distribution options is permitted to provide a section 411(a)(11) notice through the use of a pre-recorded message on an automated phone system.

2. Second, the regulations require that the electronic system be reasonably designed to alert the recipient, at the time the applicable notice is provided, to the significance of the information in the notice (including the identification of the subject matter of the notice), and provide any instructions needed to access the notice, in a manner that is as readily understandable and accessible as an applicable notice provided using a written paper document. The communication may not impose unreasonable costs on the acceptance or use of electronic records.

3. Third, the final regulations clarify that, pursuant to section 101(e) of E-Sign, if an electronic record of an applicable notice or a participant election is not maintained in a form that is capable of being retained and accurately reproduced for later reference, then the legal effect, validity, or enforceability of such electronic record may be denied.

Use of an Electronic Medium To Provide an Applicable Notice

Two Methods for Providing Applicable Notices

The final regulations provide two methods by which a plan is permitted to provide a notice through the use of an electronic medium. Under the first method, communication is permitted to be electronically provided to a recipient **after the recipient consents to the electronic delivery of the notice** (the consumer consent method). The rules under the consumer consent method reflect the consumer consent requirements found in E-Sign. The second method (the Alternative Method) provides rules that are intended generally to replicate the requirements in the 2000 regulations that apply to notices required under IRC §§402(f), 411(a)(11), and 3405, and thereby **allow plans to continue to provide these notices electronically** using electronic systems that satisfy the standards in the 2000 regulations.

<u>1. Consumer Consent Method for Providing Applicable Notices</u>

Under the consumer consent method, **before an applicable notice is provided** to a recipient using an electronic medium, the participant must consent to receive the communication electronically. The consent generally must be 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. So, the plan administrator sends the Consent form via e-mail to satisfy these criteria.

Alternatively, the consent may be made using a written paper document, but only if the participant confirms the consent in a manner that reasonably demonstrates that the participant can access the notice in the electronic form to be provided. Prior to consenting, the participant must receive a **disclosure statement that outlines the scope of the consent, the participant's right to withdraw his or her consent to receive the communication electronically (including any conditions, consequences, or fees in the event of the withdrawal), and the right to receive the communication using paper and any fees imposed for receiving paper**.

The disclosure must also specify the **hardware and software requirements** for accessing the electronic media and the procedures for updating information to contact the participant electronically. In the event the hardware or software requirements change, new consent must be obtained from the participant, generally following the rules of section 101(c) of E-Sign. In addition, under the consumer consent method, the applicable notice cannot be provided through the use of oral communication or a recording of an oral communication.

2. Alternative Method for Providing Applicable Notices

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

This exemption is based on the judgment that, **if the consumer consent method were the only method available to satisfy the requirements for providing an applicable notice through the use of an electronic medium, it would impose a substantial burden on electronic commerce** with respect to retirement plans, and that the requirements and safeguards in the

2000 regulations provide a less burdensome method without increasing the material risk of harm to recipients.

Under the alternative method, at the time the applicable notice is provided, the recipient must be advised that he or she may request and receive the applicable notice in writing on paper at no charge. In addition, any recipient of the notice must be **"effectively able"** to access the electronic medium used to provide the notice.

Electronic Participant Elections

The regulations also set forth the requirements that apply if a person using an electronic system makes a consent or election. E-Sign does not apply to participant elections. The participant election rules, which are also based on the standards in the 2000 regulations, generally retain the requirements that:

(1) The participant be effectively able to access the electronic medium in order to make the participant election,

(2) The electronic system be reasonably designed to preclude any person other than the appropriate individual from making a participant election,

(3) The electronic system provide the participant making a participant election with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election before it becomes effective, and

(4) The individual making a participant election, within a reasonable time period, receive a confirmation of the election through either a written paper document or an electronic medium under a system that satisfies the applicable notice requirements of either the consumer consent delivery method or the alternative delivery method.

These regulations require that a participant be **effectively able** to access the electronic medium under an electronic system used to make a participant election, but, like the 2000 regulations, do not require that a plan also permit the election to be made by paper as an alternative to using an electronic system that is available to the participant.

However, these regulations **do not apply with respect to a participant who is not effectively able to access the electronic medium** or media in order to make a participant election. Accordingly, the plan must offer each such participant the right to make an election in another medium that is accessible to the participant (such as a paper election).

> **Note:** A plan that fails to offer paper or an electronic medium that a participant is effectively able to access will fail to comply with the participant election requirements and would likely violate other qualification requirements, such as the requirements that a plan operate in accordance with its terms, or, worse yet, be subject to penalties for failure to provide the required form in a timely manner.

§417. Accordingly, a plan subject to the QJSA requirements is **permitted to provide the notic**e to a participant through the use of electronic media as long as the plan complies with either of the two methods described above for providing electronic notices. Similarly, a participant's consent to a **distribution is permitted to be provided through the use of electronic media** if the plan complies with the standards described below, subject to obtaining a **valid spousal consent**.

IRC §417 requires any spousal consent to a waiver of a QJSA to be witnessed by a plan representative or a notary public. In accordance with section 101(g) of E-Sign, these regulations authorize the use of an electronic acknowledgment or notarization if the standards of section 101(g) of E-Sign and State law applicable to notary publics are satisfied.

The regulations require that the signature of a spouse be witnessed in the physical presence of the plan representative or notary public. The regulations clarify that the determination of whether an electronic system used in making participant elections is reasonably designed to preclude any person other than the appropriate individual from making a participant election is based on facts and circumstances, and that a relevant factor is whether the participant election has the potential for a conflict of interest between the individuals involved in the election.

The regulations also clarify that if an applicable notice or participant election is recorded electronically, the electronic record must be in a form that is capable of being reproduced for later reference.

Conforming to Other Rules

The final regulations modify a number of existing regulations (including the 2000 regulations) that have previously provided rules relating to the use of new technologies in providing applicable notices or making participant elections that are required to be in writing or in written form. These modifications, which merely add the consumer consent requirements of E-Sign, are not expected to affect adversely the existing administrative practices of plan sponsors designed to comply with the 2000 regulations. Thus, in practice you may see a variety of different formats for complying with electronic delivery. The key to verify compliance is to know for what purpose is the delivery being used and thus what standards are required and what are acceptable.

In addition, the final regulations apply to categories of applicable notices that were not previously addressed in the 2000 regulations or subsequent regulations. As such, the final 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 such other requirement specifically cross-references the final regulations. Thus, safe harbor notices under IRC§§ 401(k)(12)(D) and 401(m)(11), which are required to be in writing, can be provided electronically if the requirements of Treas. Reg. IRC §1.401(a)-21 are satisfied.

Effective Date

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

Other Applications for E-Sign

The E-Sign Act was designed to facilitate electronic commerce, such as consumer banking and mortgage transactions. Although it does not expressly address employee benefit plan issues, plan sponsors might be able to use the Act to develop new and more efficient electronic notices, benefit and loan applications, verification procedures and recordkeeping systems.

Further joint guidance will be required from the Departments of Labor and the Internal Revenue Service before we really move forward to keep the new technology available under employee benefit plans. Today, the guidance is a bit disjointed with the DOL essentially layering some additional and distinct requirements to the final regulations.

Defining an Electronic Signature

According to the E-Sign Act, an "electronic signature" is an "electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." Practically speaking, an electronic signature can be any electronic verification system that the parties agree to use. The Act does not state what an electronic signature looks like or what technology must be used to create the signature.

Various electronic signature formats are being developed today, ranging from scanning in a handwritten signature to computer recognition of a retinal scan. Another type of electronic signature is a "smart card" that is swiped on a reader attached to a personal computer and used with a password. (The President used such a card to sign the E-Sign Act, as well as a felt-tip pen.)

Don’t Apply E-Sign to All Documents Just Yet

The E-Sign Act applies to transactions in or affecting interstate or foreign commerce. The law's broad reach appears to include many benefits-related transactions, and specifically applies to the insurance business. However, it does not apply to the cancellation or termination of health insurance, health benefits or life insurance benefits (excluding annuities).

The E-Sign Act also does not apply to the creation and execution of wills, codicils, or testamentary trusts; adoption, divorce or other family law matters; or certain provisions of the Uniform Commercial Code (UCC). Finally, the law would not affect court-required notices, notices of utility cancellations, notices of property foreclosures or evictions, consumer recall notices or documents accompanying the transportation of hazardous material.

Notice of Electronic Transmission

This is to advise you that we have provided you with an electronic Notice regarding your 401(k) Plan account.

This information is important because [list the general subject matter of the Notice]

Please know that if you request a paper copy of this Notice, we will provide one to you at no charge. To request a paper copy, contact:

[list contact person, address and telephone number]

[Insert Plan Name]

Consent for Electronic Transmission

This information is sent to you electronically to allow you to consent to receive all information about your plan electronically. All notices, elections and other communication will be sent to you electronically upon receipt of this form. You may withdraw your consent at any time by notifying the person listed below. You have the right to request a paper version at any time, free of charge.

Please confirm your intentions below and provide any alternate e-mail address you wish us to use. Any Questions?? Call:

[List contact person, e-mail address and telephone number]

In order to access the information, you will need to use your work computer or for items posted onto the secure website you will need: [list hardware or software requirements].

☐ **I consent to the receipt of electronic information and use of the e-mail address that this Notice was sent to is satisfactory.**

☐ **I consent to the receipt of electronic information and use of the e-mail address that this Notice was sent to is satisfactory and I would like to add an additional e-mail address: ______.**

[Insert Plan Name]

Notice of Electronic Transmission

This is to advise you that we or our service providers have changed the hardware or software used in electronically transmitting information to you about your 401(k) Plan account.

You previously consented to electronic delivery of all communications from [plan name]. We now need for you to consent again to the electronic transmission of all communications for the [plan name]. Please confirm your intentions below and provide any alternate e-mail address you wish us to use.

Any Questions??

Call: [List contact person, e-mail address and telephone number]

☐ **I consent to the continuing receipt of electronic information and use of the e-mail address that this Notice was sent to is satisfactory.**

☐ **I consent to the continuing receipt of electronic information and use of the e-mail address that this Notice was sent to is satisfactory and would like to add an additional e-mail address: _____.**

[Insert Plan Name]

Withdrawal of Consent for Electronic Transmission

This is to advise you that I no longer wish to consent to electronic transmission for information about my 401(k) Plan account.

☐ **I understand that I will no longer be in receipt of electronic communication from the plan and this may delay the transmission of communication to me.**

All communication should be sent to me at the following address: _____

____
Signature of Plan Participant

___/___/___
Date

Electronic Delivery Examples[1]

Example 1 - Consumer Consent Requirements to Deliver A Section 402(F) Notice Via E-Mail.

Facts: Plan A, a qualified plan, permits participants to request benefit distributions from the plan on Plan A's Internet Web site. Under Plan A's system for such transactions, a participant must enter his or her account number, personal identification number (PIN), and his or her e-mail address to which the notice is to be sent. The participant's PIN and account number must match the information in Plan A's records in order for the transaction to proceed. Participant H requests a distribution from Plan A on Plan A's Web site, and, at the time of the request for distribution, a disclosure statement appears on the computer screen that explains that Participant H can consent to receive the section 402(f) notice electronically.

The disclosure statement provides information relating to the consent, including how to receive a paper copy of the notice, how to withdraw consent, the hardware and software requirements, and the procedures for accessing the section 402(f) notice, which is in a file format from a specific spreadsheet program. After reviewing the disclosure statement, Participant H consents to receive the section 402(f) notice via e-mail by selecting the consent button at the end of the disclosure statement. As a part of the consent procedure, an e-mail is sent to Participant H's e-mail address in order to demonstrate that Participant H can access the spreadsheet program. In the e-mail, Participant H is prompted to answer a question from the spreadsheet program, which is in an attachment to the e-mail. Once Participant H correctly answers the question, the section 402(f) notice is then delivered to Participant H via e-mail.

Conclusion. Plan A's delivery of the section 402(f) notice to Participant H satisfies the electronic delivery notice requirements.

Example 2 -Alternative Method To Deliver A Section 411(A)(11) Notice Via E-Mail

Facts: Plan B, a qualified plan, permits participants to request benefit distributions from the plan on Plan B's Internet Web site. Under Plan B's system for such transactions, a participant must enter his or her account number and personal identification number (PIN), and his or her e-mail address to which the notice is to be sent. The participant's PIN and account number must match the information in Plan B's records in order for the transaction to proceed.

After Participant K, a single employee, requests a distribution from Plan B on Plan B's Internet Web site, the plan administrator provides Participant K with a section 411(a)(11) notice in an attachment to an e-mail. Plan B sends the e-mail with a request for a computer generated notification that the message was received and opened. The e-mail

[1] Adapted from Treasury Regulation 1.401(a)(21).

instructs Participant K to read the attachment for important information regarding the request for a distribution. In addition, the e-mail also states that Participant K may request the section 411(a)(11) notice on a written paper document and that, if Participant K requests the notice on a written paper document, it will be provided at no charge. Plan B receives notification indicating that the e-mail was received and opened by Participant K.

Conclusion. Plan B's delivery of the section 411(a)(11) notice satisfy the requirements the final regulations.

Example 3 - Facts Involving Making A Participant's Consent To A Distribution

Facts: In order to consent to a distribution, Plan B requires a participant to enter the participant's account number and PIN in order to preclude any person other than the participant from making the election. After the authentication process, Participant K completes a distribution request form on the Web site. After completing the request form, the Web site provides a summary of the information entered on the form and gives Participant K an opportunity to review or modify the distribution request form before the transaction is completed.

Within a reasonable period of time after Participant K consents to the distribution, the plan administrator, by e-mail, sends confirmation of the terms (including the form) of the distribution to Participant K and advises Participant K that, upon request, the confirmation may be provided to Participant K on a written paper document at no charge. Plan B retains an electronic copy of the consent to the distribution in a form that is capable of being retained and accurately reproduced for later reference by Participant K.

Conclusion. Plan B's electronic system used to make Participant K's consent to a distribution satisfy the final regulations.

Example 4 - Transmission Of A Spousal Consent Via Electronic Notarization

Facts: Plan C, a qualified money purchase pension plan, permits a married participant to request a plan loan through the Plan C's Internet Web site with the notarized consent of the spouse. Under Plan C's system for requesting a plan loan, a participant must enter his or her account number, personal identification number (PIN), and his or her e-mail address. The information entered by the participant must match the information in Plan C's records in order for the transaction to proceed. Participant M, a married participant, is effectively able to access the Web site available to apply for a plan loan.

In order to apply for a loan, Plan C requires a participant to enter the participant's account number and PIN in order to preclude any person other than the participant from making the election. Participant M completes the loan application on Plan C's Web site. Within a reasonable period of time after submitting the plan loan application, the plan administrator, by e-mail, sends Participant M the loan application, including all attachments setting forth the terms of the loan agreement and all other required information. In the e-mail, Plan C also notifies Participant M that, upon request, the loan application may be provided to Participant M on a written paper document at no charge.

Plan C then instructs Participant M that, in order for the loan application to proceed, Participant M must submit to the plan administrator a notarized spousal consent form. Participant M and M's spouse go to a notary public and the notary witnesses Participant M's spouse signing the spousal consent for the loan agreement on an electronic signature capture pad with adequate security. After witnessing M's spouse signing the spousal consent, the notary public sends an e-mail with an electronic acknowledgement that is attached to or logically associated with the signature of M's spouse to the plan administrator. The electronic acknowledgement is in accordance with section 101(g) of E-Sign and the relevant State law applicable to notary publics. After the plan receives the e-mail, Plan C sends an e-mail to Participant M, giving M a reasonable period to review and confirm the completed loan application and to determine whether the loan application should be modified or rescinded.

In addition, the e-mail to Participant M also provides that M may request the completed loan application on a written paper document and that, if M requests the written paper document, it will be provided at no charge. Plan C retains an electronic copy of the loan agreement, including the spousal consent, in a form that is capable of being retained and accurately reproduced for later reference by all parties.

Conclusion. The transmission of the plan loan agreement satisfies the final regulations. By requiring that the spouse sign the spousal consent on an electronic signature capture pad in the physical presence of a notary public, the electronic system satisfies the requirement that the system be reasonably designed to preclude any person other than the appropriate individual from making the election. Thus, the electronic notarization of spousal consent satisfies electronic criteria.

Example 5 - Alternative Method To Deliver A Section 411(A)(11) Notice Via An Automated Telephone System

Facts: Profit-sharing plan (Plan D) permits participants to request distributions through an automated telephone system. Under Plan D's system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match the information in Plan D's records in order for the transaction to proceed. Plan D provides only the following distribution options: single-sum payment; and annual installments over 5, 10, or 20 years.

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

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

Conclusion. 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, so the automated telephone procedures of Plan D satisfy the applicable for electronic delivery.

Example 6. Verbal Communication

Facts: Same facts as Example 5, 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.

Conclusion. As in Example 5, because Plan D has relatively few and simple distribution options, the automated telephone system is no less understandable to the participant than a written paper notice the customer service telephone procedures of Plan D satisfy the requirements of the final regulations.

Example 7. Effective Availability

Facts. Plan E, a qualified plan, permits participants to request distributions by e-mail on the employer's e-mail system. Under this system, a participant must enter his or her account number, personal identification number (PIN), and e-mail address. This information must match that in Plan E's records in order for the transaction to proceed. If a participant requests a distribution by e-mail, the plan administrator provides the participant with a section 411(a)(11) notice by e-mail.

The plan administrator also advises the participant by e-mail that he or she may request the section 411(a)(11) notice on a written paper document and that, if the participant requests the notice on a written paper document, it will be provided at no charge. Participant Q requests a distribution and receives the section 411(a)(11) notice from the plan administrator by reply e-mail. However, before Participant Q elects a distribution, Q terminates employment. Following termination of employment, Participant Q no longer has access to the employer's e-mail system.

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

[i] In addition, the 2006 final regulations apply to any notice, election, or similar communication provided to or made by a participant or beneficiary in the following employee benefit arrangements: an accident or health plan or arrangement under IRC§§104(a)(3) or 105; a cafeteria plan under IRC§125; an educational assistance program under IRC§127; a qualified transportation fringe program under IRC§132; an Archer MSA under IRC§220; or a health savings account under IRC§223.