



AMERICAN BENEFITS  
COUNCIL

October 11, 2005

VIA ELECTRONIC FILING

CC:PA:LPD:PR (REG-138362-04)

Room 5203

Internal Revenue Service

POB 7604

Ben Franklin Station

Washington, DC 20044

Re: Proposed Regulations on Use of Electronic Technologies for Providing Employee Benefit Notices and Transmitting Benefit Elections and Consents; Request to Testify at the November 2, 2005 Hearing

Dear Sir or Madam:

The American Benefits Council (Council) appreciates the opportunity to comment on the proposed regulations on use of electronic technologies to provide notices and transmit elections and consents relating to employee benefit plans. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

The Council commends the Department of Treasury and Internal Revenue Service (collectively Treasury) on the approach adopted in the regulations for addressing the use of electronic technologies to meet notice, election and consent requirements that apply to employee benefit plans. Specifically, the Council applauds Treasury for clarifying that the confirmation of a change in personal identification number (PIN) required under the regulation may be made through an electronic medium and the application of the guidance to notice, election and consent requirements applicable to 403(b) and 457 plans, as well as the addition of a number of additional notices, can be provided electronically.

The Council strongly supports the guidance provided in the proposed regulations and believes it will facilitate the use of existing technologies, as well as the development of future technologies in the retirement area. However, we offer the following comments on some aspects of the proposed regulations. We

believe these suggestions will make the regulations more effective and ease the use of paperless technology.

The Council also requests to testify on the issues outlined below at the hearing on the proposed regulations scheduled for November 2, 2005.

Notarized Consent. The proposed rule allows use of electronic media for the notice and election rules applicable to plans subject to the qualified joint and survivor annuity (QJSA) requirements of Section 417 but generally requires the spousal consent 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. Although Code Section 417 requires the consent of a spouse to be witness by a plan representative or notary public, subsection (g) of Section 101 of Electronic Signatures in Global and National Commerce Act (E-Sign) (P.L. 106-229) does not appear to require the physical presence of the plan representative or notary public:

“(g) NOTARIZATION AND ACKNOWLEDGMENT.—If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.”

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. The Council believes there should be an exception because adding a physical presence requirement appears to go beyond the rules set forth in Section 101 of E-Sign. The Council understands these rules are designed to ensure the spouse is actually the person signing but believes this concern can be addressed in a manner that will facilitate rather than hinder use of electronic technologies in plan administration.<sup>1</sup>

The Council recommends use of a separate PIN for the participant’s spouse, with appropriate cautions against sharing the PIN with anyone including their spouse, should in most cases provide sufficient verification that the spouse is the person actually “signing” the document. If the participant’s PIN is sufficient protection to ensure the participant is the person actually signing the document, the spouse’s PIN should provide similar assurance. In this case, the electronic

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<sup>1</sup> Council members have indicated that the “physical presence” rule will effectively preclude use of electronic technologies to administer distributions from plans subject to Code Section 417.

medium acts as the plan representative, especially if the distribution is processed through a “live” participant service representative.

If Treasury is not convinced that a separate PIN system provides sufficient protection, the Council recommends that the reserved section be 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.

Consumer Consent. The proposed regulations appear to indicate that if a plan relies on consumer consent (instead of the alternative method) to provide electronic notices, electronic records cannot include oral communications or recordings of oral communications (see Prop. Reg. Section 1.401(a)-21(b)(5)). Many benefit plans administered using electronic technology offer participants seeking a distribution or other action with respect to their benefit a choice between electronic mediums including web-based technology, voice response systems and discussions with a live participant service representative. If oral communications or recordings of oral communications are excluded from use by plans that use the consumer consent method of implementing the use of electronic technology, this will effectively preclude many plans from using the consumer consent method. The Council recommends Treasury clarify that plans can continue to use oral communications and recordings of oral communications when using the consumer consent method.

Again, the Council commends Treasury on the issuance of extremely helpful guidance on the use of electronic technology in the area of plan administration. We appreciate the opportunity to comment on this proposed guidance and look forward to continuing to work with you as you develop final regulations in this area. Please feel free to call me at 202-289-6700 if you need additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson  
Director, Retirement Policy  
American Benefits Council