

MEMO# 19030

July 26, 2005

IRS ISSUES PROPOSED REGULATIONS CONCERNING USE OF ELECTRONIC TECHNOLOGIES FOR PLAN-RELATED NOTICES, ELECTIONS AND CONSENTS; CONFERENCE CALL SCHEDULED FOR AUGUST 9, 2005

©2005 Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice. [19030] July 26, 2005 TO: PENSION COMMITTEE No. 26-05 PENSION OPERATIONS ADVISORY COMMITTEE No. 23-05 RE: IRS ISSUES PROPOSED REGULATIONS CONCERNING USE OF ELECTRONIC TECHNOLOGIES FOR PLAN-RELATED NOTICES, ELECTIONS AND CONSENTS; CONFERENCE CALL SCHEDULED FOR AUGUST 9, 2005 The Internal Revenue Service has issued proposed regulations providing guidance on the use of electronic media to provide certain notices to plan participants and beneficiaries and to transmit participant elections¹ relating to employee benefit arrangements.² The proposed regulations also reflect the provisions of the Electronic Signatures in Global and National Commerce Act (E-SIGN). Proposed section 1.401(a)-21 of the regulations would govern the use of electronic media for participant notices and elections that are required to be in writing or in written form. In addition, the provision would provide a safe harbor method for using such media for notices and elections that are not required to be in writing or in written form. The new section would supplement the general requirements related to each notice and election, as well as require that a notice must be required in a manner no less understandable than a written paper document.³ A notice via an electronic medium would satisfy the written document requirement if either (1) the consumer consent requirements of subsection (b) were satisfied; or (2) the requirements of subsection (c) for exemption from the consumer consent provisions were satisfied. Under proposed subsection (b), the recipient of the notice would be required to affirmatively consent to the delivery of the notice using electronic media. The recipient 1 A “participant election” under the proposed regulations includes any consent, election, request, agreement or similar communication made by or from a participant, beneficiary, or alternate payee. 2 The proposed regulations are available at <http://www.regulations.gov/fredpdfs/05-13911.pdf>. The proposed regulations would cover notices and elections under qualified plans, section 403(b) arrangements, simplified employee pensions (SEPs), simple retirement plans, and 457 plans, but would not apply to notices, elections, consents, or disclosures under the provisions of Title I or IV of ERISA. In

addition, the proposed regulations do not address tax reporting issues. 3 An example in the preamble states that a lengthy section 402(f) notice delivered through a pre-recorded message would not satisfy this requirement. 2 generally could consent either electronically or using a written paper document, but only if the recipient confirmed the consent electronically in a manner that reasonably demonstrated that the recipient could access the notice in the applicable electronic form. Specific disclosures would be required prior to such consent. The exemption from the consumer consent requirements in proposed subsection (c) would replicate the requirements in the 2000 final regulations⁴ governing such notices under Code sections 402(f), 411(a)(11), and 3405, and allow plans to continue to provide electronic notices under the 2000 rules. For example, the regulations would retain the requirement that, at the time the notice is provided, the participant must be advised that he or she may request and must receive the applicable notice in writing on paper at no charge. The rules in subsection (d) governing participant elections also would be based generally on the 2000 regulations. Unlike the 2000 regulations, however, the proposed regulations would allow the electronic notarization of spousal consent under Code section 417, if the individual's signature were witnessed in the physical presence of a plan representative or notary public. According the preamble, the regulations would apply only prospectively, and thus cannot be relied upon prior to their issuance as final regulations. The deadline for comments concerning the proposed regulations is October 12, 2005. The Service specifically requests comments on the clarity of the proposed regulations and how they can be made easier to understand. In addition, the Service asks for comments as to whether the regulations should include exceptions to the rule requiring the physical presence of the spouse for a notarization of the spouse's consent. The Service is considering whether to: (1) allow no exceptions; (2) add a general standard that does not require the spouse's presence for electronic notarization of an electronic signature; or (3) grant the Commissioner discretion to allow, after notice and comment, a particular form of electronic notarization that does not require the spouse's presence. Institute Conference Call The Institute has scheduled a conference call for Tuesday, August 9 at 2:00 p.m. Eastern time to discuss the Institute's comments concerning the proposed regulations. If you would like to participate in this call, please complete the attached response form and fax it to Brenda Turner at (202) 326-5841 or e-mail it to bturner@ici.org by noon, Tuesday, August 9. To participate in the call, please dial 888-396-9923 and enter passcode 34543. If you have any questions about the call, please contact the undersigned at (202) 371-5432 or kireland@ici.org. Kathy D. Ireland Senior Associate Counsel Attachment (in .pdf format) 4 See Memorandum to Pension Members No. 14-00 and Pension Operations Advisory Committee No. 13-00, dated February 15, 2000.