

COMMENT LETTER

March 18, 1999

Comment Letter on IRS Technology Proposals for Retirement Plans, March 1999

By Hand

March 18, 1999

Internal Revenue Service
CC:DOM:CORP:R (REG-118662-98)
Courier's Desk
1111 Constitution Avenue, N.W.
Washington, DC 20044

Re: Proposed Amendments to Treasury Regulations Concerning New Technologies

Ladies and Gentlemen:

On behalf of its investment company members, the Investment Company Institute (the "Institute")¹ submits the following comments concerning the proposed amendments to Treasury regulations governing notices and consents required in connection with distributions from retirement plans.

Introduction

Institute members and their affiliates serve as directed trustees and service providers that provide nondiscretionary recordkeeping and other services to retirement plans. They have extensive experience in applying new technologies to the administration of and recordkeeping for retirement plans and millions of non-retirement accounts. Using new technologies, investment companies have been able to provide their shareholders with timely, reliable information less expensively than is the case with a traditional "paper" system. In addition, shareholders with access to new technologies have the opportunity to implement their investment and distribution decisions promptly and accurately.

Based on the experience of the industry in this area, last fall we submitted comments in response to Internal Revenue Service Announcement 98-62, 1998-29 I.R.B. 13 (July 20, 1998), regarding the use of "new" or "paperless" technologies in retirement plan administration. These comments supported the expanded use of technology and recommended that this use be addressed by general standards, rather than by rules

tailored to specific, currently existing technologies.

We strongly support the approach of the proposed amendments to the regulations governing notice and consent issued on December 18, 1998. These proposed amendments generally would provide the guidance necessary for the expanded use of new technologies and would allow the implementation of future technologies as they become available, without the need for repeated revision of the regulations.[2](#)

Therefore, we urge the prompt adoption of final amendments, with certain minor recommended changes regarding the oral provision of Section 402(f) and Section 411(a)(11) notice summaries and Section 3405 elections. These are discussed below.

Section 402(f) and Section 411(a)(11) Notice Summaries

The proposed amendments would provide that the full written explanations required under Sections 402(f) and 411(a)(11) of the Internal Revenue Code can be provided to a plan participant at any time, if summaries of the notices are provided within a 60-day window commencing at least 90 days before the distribution. The proposed amendments would further permit these summaries to be provided telephonically. The Institute supports the Service's interpretation of the written explanation requirements under sections 402(f) and 411(a)(11) of the Code. [3](#) The practical approach proposed by the Service provides participants with the information that they need in order to make appropriate decisions with respect to a distribution.

Institute members are concerned, however, about the information that they would be required to provide as part of the oral summary of the notices. Specifically, Q & A 2(b) of Section 1.402(f)-1 of the proposed regulations would require that this summary, among other things, "refer the distributee to the most recent occasion on which the Section 402(f) notice was provided (and, in the case of a notice provided in any document containing information in addition to the notice, must identify that document and must indicate where the notice may be found in that document)." 63 Fed. Reg. 70076. Similar language appears in the proposed amendments to Section 1.411(a)-11(c)(2)(iii)(B)(3) of the regulations.

Under this formulation, if the notice were included in the plan's summary plan description (SPD), then the administrator would be required to include in the script for telephone representatives, or on the recording for the automated telephone system, specific information concerning (1) when the most recent SPD was provided, and (2) where in the SPD the notice appears. This requirement is simply not practical. Participants often receive SPDs at different times, depending upon when they became a plan participant.[4](#) Therefore, plan administrators may not be able to specify one date for the distribution of the SPD for all participants. Furthermore, a participant who wishes to read the full notice is much more likely to request a hard copy of the notice, as would be his right under the proposed amendments, than to try to locate his or her copy of the SPD.

The proposed information requirement would especially burden service providers who take requests from participants in numerous plans and would not have the specific information necessary to provide such details. Even where such information is available to the service provider, providing this plan-specific information would be operationally burdensome and unnecessarily increase the cost of plan administration. Specifically, such customized voice response automation can be costly to implement. Similarly, requiring telephone

representatives handling calls for numerous plans to identify such specific information will require the building of a complex database to which they would have access. Moreover, call-processing time would increase. These costs must be weighed against the benefit of providing information pertaining to the date of SPD receipt and a precise page number reference for the notice. We believe the administrative cost is high and the benefit de minimis.

The Institute submits that requiring such information in the summary would inhibit the development of telephonic summaries of these notices, and, indeed, preclude them under some circumstances. Instead, the Institute recommends that the final amendments permit the summary to include a general reference to the SPD or other document that contains the notice and, as is provided, clearly state that the participant may request a full written copy of the notice.

Section 3405 Withholding Elections

The proposed regulations would add to the temporary regulations under Section 3405 of the Code a new Q & A that discusses the media through which a payor may provide the notice of a payee's right to elect out of withholding on certain retirement distributions, including those from individual retirement accounts (IRAs). This proposed Q & A would allow the use of electronic media, subject to certain general requirements, which are illustrated using examples of different types of technologies.

The proposed regulations are silent, however, as to the use of electronic media for withholding elections under Section 3405. Instead, the preamble to the proposed amendments directs payors to guidance from the Service and Treasury "permitting payors to establish systems to receive" Forms W-4P electronically, and requests comment as to whether further guidance is needed.

In Announcement 99-6, 1999-4 I.R.B. 24 (January 25, 1999), the Service stated that payors may establish a system to electronically receive Forms W-4P, if the system meets certain requirements, including an electronic signature and a recordkeeping requirement. In addition, the Announcement states that, upon request by the Service, the payor must supply a hard copy of the electronic Form W-4P, and a statement that, to the best of the payor's knowledge, the form was submitted by the named payee. The hard copy must provide exactly the same information as is provided on the paper version of Form W-4P, but need not be in the same format.

Unlike the proposed regulatory amendments governing withholding notices under Section 3405, however, the Announcement provides no examples of its application to elections made via various types of media. Thus, although it is clear that the proposed amendments would permit Section 3405 notices to be provided via automated telephone systems and telephone systems using customer service representatives, the Announcement does not specifically state that Section 3405 elections may be provided via these types of technologies.

Both the Announcement and the proposed amendments refer to "electronic" systems or media; therefore, we interpret the Announcement to permit submission of Forms W-4P via telephonic means, provided that the telephonic system otherwise satisfies the requirements set forth in the Announcement. We request that the Service confirm this interpretation in the final amendments or in the preamble to the amendments.

In addition, the Institute submits that some of the technical aspects of the Announcement are impractical. For example, the Announcement requires that the "electronic signature" be the final entry in the submission. In the telephonic, and indeed in most other electronic, contexts, the "electronic signature," such as a PIN number or other identifying number or password, is entered before the caller gains access to the system. The last entry in the submission is usually a confirmation that the caller wants the selected transaction to take place.⁵ The Service should clarify that this confirmation can also qualify as the "electronic signature" if the PIN number or other identifying information is provided at the beginning of the submission. Also, the Announcement could be read to require that the payor literally preserve a facsimile of the information on Form W-4P. We request clarification that that term "facsimile" refers to any historically maintained recordation of the Section 3405 election, including audio recordings, automated telephone response entries, and notations by telephone representatives.

The Institute appreciates the opportunity to provide comments concerning these proposed amendments. Please contact me at 202/326-5835 if we can provide further information or assistance.

Sincerely,

Russell G. Galer

cc: Carol D. Gold
Catherine Livingston Fernandez
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ENDNOTES

1 The Investment Company Institute is the national association of the American investment company industry. Its membership includes 7,446 open-end investment companies ("mutual funds"), 456 closed-end investment companies, and 8 sponsors of unit investment trusts. Its mutual fund members have assets of about \$5.662 trillion, accounting for approximately 95% of total industry assets, and have over 73 million individual shareholders.

2 We also support the Service's issuance of Notice 99-1, 1999-2 I.R.B. 8 (January 11, 1999), in which the Service stated that no provision of Section 401(a) of the Internal Revenue Code requires the use of written paper documents or prohibits conducting transactions such as participant enrollments, direct rollover elections, and cash or deferred elections through electronic media.

3 As we noted in our comments in response to Announcement 98-62, we recognize that the full Section 402(f) notice may be too lengthy to be provided telephonically.

4 Section 104(b)(1)(A) of ERISA generally requires that the plan administrator furnish the SPD to a participant within 90 days after he becomes a participant.

5 The Service recognized this fact in its discussion of the requirement in the proposed amendments under Section 411(a)(11) that "the system must provide the participant with a reasonable opportunity to review and to confirm, modify, or rescind the terms of the distribution before the consent to the distribution becomes effective." In the preamble, the

Service states that "[i]t is sufficient for the plan to provide this opportunity immediately before the participant completes the session in which the consent is given (for example, before exiting the plan web site or at the end of an automated telephone transaction)." 63 Fed. Reg. 70075.

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