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Use of Electronic Medium to Furnish Participant Documents, Notices and Elections

QPN Highlights

- Electronic medium may be used to deliver participant documents, notices, consents and election options (i.e., participant communications) when certain requirements are met.
- The Department of the Treasury (the Treasury) and the Department of Labor (DOL) each has its own regulations for electronic delivery of participant communications that are within its own jurisdiction.

In this age of electronic communication the ability to deliver participant documents, notices, consents and election options through electronic medium can be a great convenience and cost savings to plan sponsors. Both the Treasury and the DOL recognize this and each has its own regulation for use of electronic media. Participant communications required by the Treasury must follow the Treasury regulation and participant communications required by the Employee Retirement Income Security Act (ERISA) must follow the DOL regulation for the use of electronic medium for delivery of those communications. The document, notice, election or consent will be treated as provided in writing if all the requirements of the appropriate regulation are met.

Treasury rules for electronic delivery – key points

The current rules for providing paperless participant transactions (i.e., electronic documents, notices, elections and consents) are covered under Treasury regulation 1.401(a)-21. This regulation includes tax code requirements regarding these communications and certain provisions of the ERISA that parallel the tax code requirements. It also incorporates The Electronic Signatures in Global and National Commerce Act, also known as E-SIGN.

Covered plans: These include a qualified retirement plan under 401(a), 401(k) or 403(a); a section 403(b) plan; a simplified employee pension (SEP) under section 408(k); a simple retirement plan under section 408(p); an eligible governmental plan under section 457(b), a Roth IRA and a deemed IRA, as well as certain other employee benefit arrangements. The rules may also be used as a safe harbor for any document, notice or election under the plan that is not required to be provided in writing (e.g., participant enrollments, contribution elections, beneficiary designations (other than spousal consent)).

Covered individuals: A covered individual is a participant, beneficiary, alternate payee or other individual (referred to here as participants) entitled to benefits under a retirement plan, other employee benefit arrangement or individual retirement plan as noted above.

Covered communications: These include documents, notices, elections or consents under retirement plans that are required to be provided in writing under the Internal Revenue Code, Department of Treasury regulations or other guidance issued by the Commissioner. Examples of the communications that may be delivered to participants using electronic medium under 1.401(a)-21 include (but are not limited to) participant distribution notice and consent, spousal consent, safe harbor 401(k) plan notice, election to receive a participant loan and the loan agreement.

General requirements for electronically provided notices:

- Content and timing requirements of the notice or communication must be met.
- Content of the notice must be no less understandable than in a written paper form.
- The electronic system must alert the participant to the significance of the notice and provide the instructions needed to access and retain the notice.

Consumer Consent Requirements: Participants must consent to receive the notice or election opportunity electronically by meeting the following requirements:

- The general requirements above must be met.
- The notice must not be provided through oral communication or a recording of an oral communication.
- The participant must affirmatively consent to electronic delivery of the notice in a manner that demonstrates the participant can access the electronic medium and form that will be used.

- If consent is withdrawn prior to the date the notice is furnished then electronic delivery may not be used.
- A disclosure statement, that explains the participant's rights, must be furnished to the participant before the participant gives consent.
- The participant must be notified of hardware/software changes that create a material risk to the participant's ability to access the documents and, receive a statement of his/her rights including the need to reaffirm consent based on this change.

Alternative to consumer consent requirements: As an alternative to the consumer consent requirements described above, electronic delivery may be used if the participant has effective access to the electronic delivery system that will be used and at the time the electronic notice is delivered the participant is advised in writing that, upon request, a paper copy will be provided at no charge.

Rules for electronic participant elections: A participant election includes any consent, election, request, agreement, or similar communication made by or from a participant, beneficiary, alternate payee or individual entitled to benefits under a retirement plan, employee benefit agreement, or individual retirement plan. These elections may be made electronically if the general and consumer consent requirements above are met and the following requirements are met:

- The participant must have effective access to the electronic system.
- The participant's identity is authenticated and the participant has the opportunity to review, confirm, modify or rescind the election before it becomes effective.
- The participant receives confirmation, on paper or electronically, that the election was processed.
- Elections or consents that require a witness for the signature of the participant and/or

spouse must be witnessed in the physical presence of the plan representative or notary. However, an electronic notarization acknowledging a signature is acceptable if it meets the regulatory requirements and State law.

DOL rules for electronic delivery – key points

Documents required to be furnished to participants under Title I of ERISA must be delivered in a manner reasonably calculated to ensure actual receipt of the material and this includes the use of electronic media if the requirements of DOL §2520.104b-1(c) are met. This regulation also incorporates The Electronic Signatures in Global and National Commerce Act, also known as E-SIGN.

Covered plans: These are plans that are covered under Title I of ERISA.

Covered individuals: Plan participants and beneficiaries (referred to here as the “participants”) may receive documents through electronic media if the system requirements outlined below are met and the participant falls into one of the two groups of participants described below.

Covered documents: Covered documents are materials required to be furnished to participants under Title I of ERISA including reports, statements, notices and other documents (e.g., the Summary Plan Description, Summary of Material Modifications, Summary Annual Report, participant benefit statements, participant fee disclosure and investment-related information to meet the requirements of a participant-directed plan under 404(c)).

System requirements: The plan administrator must take measures reasonably calculated to ensure the system furnishing the documents meets these requirements:

- Electronic delivery results in actual receipt of the document (e.g., electronic return-receipt).
- Protects the confidentiality of the participant’s personal and account information.
- Furnishes the communication in a manner that meets the style, format and content requirements of that communication.
- The participant must be advised of the significance of the document and the right to request paper when the document is delivered.
- The participant may request a paper version of the document upon request.

Participants who may receive electronic communications fall into one of two groups:

Group 1 – Participants currently employed by the employer who:

- Have the ability to effectively access communications furnished electronically at any location where the participant is reasonably expected to perform duties and
- The electronic system the participant has effective access to is an integral part of the participant’s duties.

Group 2 – Participants, beneficiaries and other individuals who don’t meet the requirements of Category 1 who:

- Are participants, beneficiaries and other individuals entitled to receive documents under Title I of ERISA and who have affirmatively elected to receive documents through electronic media.
- Can reasonably demonstrate the ability to access information used to provide information regarding consent and provides an address for receipt of electronically furnished documents.
- Prior to consenting are provided a statement describing the documents to be delivered electronically, the participant’s rights and the hardware/software requirements.
- Are notified of hardware/software changes that create a material risk to the participant’s ability to access the documents and receive a statement of their rights and the need to reaffirm consent based on this change.

DOL grants permission to use IRS regulations for certain documents:

The DOL has given specific permission to have certain documents furnished electronically using the Treasury regulations. Notably, pending further guidance, participant benefit statements will be in good faith compliance if they are delivered electronically using either the DOL regulations or the Treasury regulations as described under Field Assistance Bulletin 2006-03.

Proceed with caution: Nothing in this high level summary should be construed as legal approval by Voya regarding the appropriateness of electronic delivery with regard to a sponsor employer's specific forms or facts and circumstances. Both regulations are complex and should be reviewed carefully by the sponsoring employer and the plan's attorney.

Voya Position: For plan sponsors that have the required technology and where the system is effectively available to participants, electronic medium may be an efficient and cost effective means of delivering participant documents, notices, consents and election opportunities.

IRS Circular 230 Disclosure

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