

Section 411.—Minimum Vesting Standards

26 CFR 1.411(a)–11: Restriction and valuation of distributions.

T.D. 8873

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Parts 1, 35, and 602

New Technologies in Retirement Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains amendments to the regulations governing certain notices and consents required in connection with distributions from retirement plans. Specifically, these regulations set forth applicable standards for the transmission of those notices and consents through electronic media and modify the timing requirements for providing certain distribution-related notices. The regulations provide guidance to plan sponsors and administrators by interpreting the notice and consent requirements in the context of the electronic administration of retirement plans. The regulations affect retirement plan sponsors, administrators, and participants.

DATES: *Effective Date:* These regulations are effective January 1, 2001.

Applicability Date: These regulations apply to plan years beginning on or after January 1, 2001.

FOR FURTHER INFORMATION CONTACT: Catherine Livingston Fernandez, (202) 622-6030 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1632. Responses to this collection of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to,

a collection of information unless the collection of information displays a valid control number.

The estimated annual burden per respondent and/or recordkeeper is 76 minutes.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to the Income Tax Regulations (26 CFR parts 1 and 35) under sections 402(f), 411(a)(11) and 3405(e)(10)(B). The regulations under section 3405(e)(10)(B) (new Q/A d-35 and d-36 of section 35.3405-1), like the regulations under sections 402(f) and 411(a)(11) are final regulations. These regulations finalize proposed regulations that were published as a notice of proposed rulemaking (REG-118662-98, 1999-13 I.R.B. 13) in the **Federal Register** (63 FR 70071) on December 18, 1998. A public hearing was held on the proposed regulations on April 15, 1999.

In addition to the proposed regulations, the IRS and Treasury issued Notice 99-1 (1999-2 I.R.B. 8), and Announcement 99-6 (1999-4 I.R.B. 24), concerning the use of electronic media under retirement plans. Notice 99-1 confirms that the “paperless” administration of participant enrollments, contribution elections, investment elections, beneficiary designations (other than designations requiring spousal consent), direct rollover elections, and certain other transactions do not cause a qualified plan to fail to satisfy the requirements of section 401(a) (or the requirements for a qualified cash or deferred arrangement under section 401(k)). Announcement 99-6 authorizes the electronic transmission of Form W-4P.

The proposed regulations, Notice 99-1,

and Announcement 99-6 were issued pursuant to section 1510 of the Taxpayer Relief Act of 1997. That section provides for the Secretary of the Treasury to issue guidance designed to interpret the notice, election, consent, disclosure, time, and related recordkeeping requirements under the Code and the Employee Retirement Income Security Act of 1974 (ERISA) regarding the use of new technologies by sponsors and administrators of retirement plans and to clarify the extent to which writing requirements under the Code relating to retirement plans permit paperless transactions. Section 1510 provides that the guidance must protect participant and beneficiary rights. Any final regulations applicable to this guidance may not be effective until the first plan year beginning at least six months after issuance as final regulations.

Explanation of Provisions

General

Commentators generally praised the approach taken in the proposed regulations of providing broad, flexible standards for the transmission of certain notices and consent required for distributions through electronic media. Commentators stated that the guidelines set forth in the proposed regulations facilitate the expanded use of new technologies and recognize the likelihood of future technological advances in plan administration. Accordingly, the final regulations retain this approach and:

- Permit electronic delivery of the notice of distribution options and the right to defer distribution under section 411(a)(11), the rollover notice under section 402(f), and the withholding notice under section 3405(e)(10)(B);
- Permit electronic transmission of participant consent to a distribution under section 411(a)(11); and
- Permit a plan to provide the section 411(a)(11) and section 402(f) notices more than 90 days before a distribution, if the plan provides a summary of the notices within 90 days before the distribution.

Notices Under Sections 402(f), 411(a)(11), and 3405(e)(10)(B)

1. Use of electronic media for delivery of notices

The proposed regulations provide that, in general, a plan may furnish a notice re-

quired under section 402(f), 411(a)(11), or 3405(e)(10)(B) either on a written paper document or through an electronic medium reasonably accessible to the participant to whom the notice is given. The proposed regulations require that any electronic notice be provided under a system reasonably designed to give the notice in a manner no less understandable to the participant than a written paper document and that the participant be advised of the right to request and to receive a copy of the notice on a written paper document without charge. The final regulations adopt these rules without change.

One commentator noted that the proposed regulations do not define the term *reasonably accessible* and suggested that the final regulations require that participants have effective access at their place of work to any electronic medium used to deliver the notices under sections 402(f), 411(a)(11), and 3405(e)(10)(B). The IRS and Treasury, after further consideration, believe that the reasonably accessible standard protects the interests of plan participants and, therefore, have retained the proposed terminology.

The same commentator raised more general concerns with the use of electronic media to transmit notices. This commentator argued that an electronic notice should be “actually received (not just sent or available) and read by the participant, be permanently accessible, and easily converted to a printed document, by using an available printer and/or through a request for a paper writing.” In response to these concerns, the IRS and Treasury reiterate the view, expressed in the preamble to the proposed regulations, that the legal standards for the delivery of distribution-related notices under sections 402(f), 411(a)(11), and 3405(e)(10)(B) should be the same regardless of the medium of delivery. Additionally, the IRS and Treasury note that many of the concerns raised by this commentator about electronic media are adequately addressed by the requirement in the regulations that participants always have the right to request and to receive a written paper notice without charge.

Several commentators objected to the requirement that participants be able to receive the notice on a written paper document upon request. These commentators argued that simply making written paper

notices available through an electronic medium (such as a printing option on an e-mail system or a plan web site) protects the interests of participants in having access to written paper notices without placing the burden of providing written paper notices on plan sponsors and administrators. However, the IRS and Treasury believe that the right to request and to receive a written paper notice is an important fail-safe for paperless plan administration. The requirement ensures that no participant is denied ready access to a usable copy of a required distribution notice, and it limits the need for the IRS and Treasury to regulate the manner in which written paper notices are made available through electronic media. The IRS and Treasury believe that the burden for plan sponsors and administrators to maintain a process that will generate written paper notices upon request is outweighed by the important safeguards provided by the requirement. In addition, as indicated in the preamble to the proposed regulations, the written paper notice provided on request need not be identical to the electronic notice. Therefore, the written paper notice can be either a printed version of the electronic notice or a separate notice prepared for distribution on paper. In light of these considerations, the requirement is retained in the final regulations.

One commentator requested clarification that the proposed regulations under section 3405 would permit the electronic delivery of the annual notice described in section 3405(e)(10)(B)(i)(III) (which is provided to recipients of periodic payments). The proposed regulations, as written, apply to that annual notice; however, the final regulations make this point expressly. One commentator asked that the proposed regulations be amended to provide for electronic withholding elections under section 3405 in addition to electronic transmission of notices under section 3405. It is unclear what, if any, utility such a change in the regulations would have in light of the ability to use electronic media for transmission of Form W-4P, as set out in Announcement 99-6. Therefore, no change has been made to the regulations on this point.

2. Flexibility for timing requirement in providing notices

Commentators favored the provision in the proposed regulations that provided flexibility with respect to the 90-day pe-

riod under sections 402(f) and 411(a)(11) by providing an alternative timing rule. Under this alternative timing rule, a plan may give the full section 402(f) and section 411(a)(11) notices more than 90 days before the distribution and provide the participant a summary of the notice during the 90/30-day period under those sections. The full notice is not required to be provided on a regular periodic basis and may be provided in connection with other materials (for example, in the summary plan description or in a brochure describing plan distribution features), but it must be updated (and provided to the participant) as necessary to ensure accuracy as of the time the summary is given. The proposed regulations provide that the summary notice must set out the principal provisions of the full notice, must refer the participant to the most recent occasion on which the full notice was provided, and must advise the participant of the right to request and to receive a copy of the full notice without charge.

Several commentators interpreted the requirement in the proposed regulations that the summary refer the participant to the most recent occasion on which the full notice was provided as requiring an indication of the precise date on which the participant was given the full notice and the precise location of the full notice if it was provided in a document containing other information (such as the summary plan description). These commentators argued that this information may vary on a participant-by-participant basis and so imposes a considerable administrative burden on plan sponsors and administrators.¹

The IRS and Treasury did not intend for the proposed regulations to be construed as requiring individualized information about the full notice. Therefore, the final regulations clarify, first, that the summary must refer participants to the most recent *version* of the full notice. The purpose of this rule is to minimize confusion among participants if more than one version of a full notice has been provided in the past. In many of those

cases, this reference could reasonably be made by calendar year (for example, by referring to the 1999 version of the section 402(f) notice). If more than one version of a distribution notice was provided in a single calendar year, more precise reference should be made (for example, by referring to the May 1999 version of the section 402(f) notice). Reference to the notice by month or year would not be necessary if only one version of the notice had been provided in the past. If the full notice were constantly available (for example, a notice that is available on a plan web site and is kept up-to-date), it would be adequate to state that fact.

Additionally, the regulations have been modified to provide that, in the case of a full notice provided in a document containing other information, the summary must identify that document and must provide a reasonable indication of where the notice may be found in the document. This requirement could be satisfied through a number of means, including identification of page number, section heading, an index reference, the title of the notice, or any other reference that would reasonably direct the participant to the notice.

One commentator objected to the alternative timing rule set out in the proposed regulations. This commentator argued that distribution-related notices should be tied to a specific event (such as a participant request for a distribution) and that “it is inappropriate to provide a notice of the notice when using electronic or other new technologies when it is just as easy to provide the actual notice itself.” The IRS and Treasury agree that the information contained in the section 402(f) and section 411(a)(11) notices should be provided to a participant in connection with the participant’s contemplation of a distribution, but the IRS and Treasury believe that providing a summary of a previously provided notice and informing the participant of the right to request and to receive the full notice adequately protect the interests of participants in this regard.

The preamble to the proposed regulations includes an example of a summary section 402(f) notice provided through an automated telephone system. Many commentators raised questions about this example. Several commentators argued that the sample summary is too long and com-

¹ For example, many plan sponsors provide a copy of the summary plan description to each employee when the employee is first hired. If the full notice is provided through the summary plan description, the precise date on which the full notice was last provided could differ for each participant.

plex to be of use in plan administration; others argued that it does not include reference to every potentially applicable rule concerning the taxation of plan distributions (for example, it does not refer to the taxation of net unrealized appreciation on the distribution of employer securities). Commentators also inquired about the legal status of the example because of its placement in the preamble. The example was intended merely to illustrate a summary notice that, in the view of the IRS and Treasury, satisfies the requirements of the proposed regulations. It was not intended as a model summary or as the exclusive form for such a summary. Although the example is not restated in these final regulations, the IRS and Treasury are considering whether to issue additional guidance providing additional examples of summary notices. In this regard, the IRS and Treasury will solicit comments from interested parties regarding the development of those examples and will invite interested parties to submit draft summary notices to assist in the development of that guidance.

Consent Under Section 411(a)(11)

Consistent with the proposed regulations, the final regulations provide that, in general, a plan may receive a participant's consent either on a written paper document or through an electronic medium reasonably accessible to the participant. As in the case of participant notices, the regulations generally do not categorize particular electronic media as either permissible or impermissible for this purpose and do not prescribe detailed, media-specific rules. The standards are intended to parallel the key attributes of participant consent provided on written paper documents without imposing more stringent requirements on electronic consents. The proposed regulations provide that participant consent transmitted through an electronic medium must be given under a system that is reasonably designed to preclude an individual other than the participant from giving the consent and that provides the participant a reasonable opportunity to review and to confirm, modify, or rescind the terms of the distribution before the consent to the distribution becomes effective. Comments on this portion of the proposed regulations were generally favorable, and no change has been

made in the final regulations.

One commentator, however, objected outright to the use of electronic media for the transmission of participant consent and argued that, at a minimum, such consent "should not be effective until after a written confirmation is received and the participant has a specified amount of time to revoke it." This commentator also argued that the final regulations should prohibit the use of automated telephone systems to provide distribution-related notices and to receive participant consent unless an automatic, mandatory written confirmation of the participant's election of a distribution option is required along with a seven-day right of revocation. The IRS and Treasury concluded that it is not advisable to impose new revocation rules based on the medium through which a participant consents to a distribution. Both the proposed regulations and the final regulations require that the terms of any consent made through an electronic medium be confirmed to the participant. Additionally, the IRS and Treasury do not believe that a right of revocation for a defined period after consent is given is more necessary or appropriate in the case of consent made through an electronic medium than it is in the case of consent made through a written paper document. More generally, the IRS and Treasury do not believe that the use of electronic media is improper or inappropriate for the transmission of a participant's consent under section 411(a)(11). If the requirements of the regulations are satisfied, consent provided in that manner should reflect the considered wishes of the participant as reliably as a consent provided through a written paper document.

Changes to the Examples in the Regulations

Several commentators expressed concern about details in the examples illustrating the proposed regulations for distribution notices and consent. One of the concerns involved the statement in the examples that a participant who wished to change a PIN electronically would be unable to proceed with a distribution transaction until the plan sent a confirmation of the change to the participant. Commentators stated that the electronic systems maintained by plan sponsors and administrators use an array of security features to ensure participant identity, some of which might

permit an electronic transaction to proceed after a PIN change. Although the prohibition on proceeding with an electronic transaction after a PIN change was intended only to illustrate a commonly used system and not as a substantive requirement, the final regulations omit the statement from the examples for the sake of clarity. Of course, the examples in the final regulations presuppose that plan sponsors and administrators maintain adequate measures to ensure participant identity when a PIN is changed.

Notice 99-1 and Announcement 99-6

Commentators expressed support for Notice 99-1, which indicates that a qualified plan will not fail to meet the requirements of section 401(a) (and that a qualified cash-or-deferred arrangement will not fail to meet the requirements of section 401(k)) merely because it permits a participant or beneficiary to use electronic media to effect a transaction for which no specific provision of the Code, the regulations, or other guidance of general applicability sets forth rules or standards regarding the media through which it may be conducted. Announcement 99-6 permits the electronic transmission of Form W-4P.

Commentators asked for clarification whether Form W-4P may be transmitted through a telephone system. The underlying standards for the electronic transmission of Form W-4P are intended to be the same as those for the electronic transmission of Form W-4, as set out in §31.3402(f)(5)-1(c). The preamble to the proposed regulations for the electronic transmission of Form W-4 indicates that "[i]f an employer chooses to establish an electronic system, the employer will be free to determine the type of system (such as telephone or computer) or systems available to its employees." (59 FR 18508 (Apr. 15, 1994)). Therefore, the use of a telephone system for electronic transmission of Form W-4P, if otherwise consistent with Announcement 99-6 and §31.3402(f)(5)-1(c), is permissible.

Commentators also asked the IRS and Treasury to reconsider the requirement, stated in Announcement 99-6, that the electronic signature on Form W-4P be the final entry in the submission of the form. These commentators argue that this effectively requires the participant in most cases to enter a PIN at both the beginning

and the end of a transaction that involves the use of an electronic Form W-4P. The IRS and Treasury are considering this issue and anticipate issuing additional guidance on this question.

Scope of These Regulations

These regulations do not address the application of Title I of ERISA (except for section 203(e)) to the use of electronic media for any plan communication or transaction. Several commentators requested that the regulations be expanded to include matters not covered by the proposed regulations. Most notably, commentators asked that the IRS and Treasury provide guidance on the use of electronic media for plan loans under section 72(p), nondiscrimination safe-harbor notices under sections 401(k)(12) and 401(m)(11), notices under section 204(h) of ERISA, and distribution notices, elections, and spousal consents governed by sections 401(a)(11) and section 417.

The IRS and Treasury are actively considering comments submitted on regulations proposed under section 72(p) and expect to issue additional guidance under that section. It is anticipated that any guidance on the use of electronic media in connection with plan loans would be issued in connection with that additional guidance. As the IRS and Treasury have noted in the past, notices under sections 401(k)(12) and 401(m)(11) and ERISA section 204(h) present legal issues distinct from those presented by notices under sections 402(f), 411(a)(11), and 3405(e)(10)(B). Notice 2000-3 (2000-4 I.R.B. 413) provides that, pending further guidance, notices under sections 401(k)(12) and 401(m)(11) may be issued through electronic media if standards set forth in Notice 2000-3 which are similar to those applicable to notices under these regulations, are satisfied. Because of the unique considerations applicable to notices under ERISA section 204(h), guidance with respect to the use of electronic media in connection with section 204(h) notices is not being issued at this time.

Finally, regarding notices, elections, and spousal consents governed by sections 401(a)(11) and section 417, the IRS and Treasury note that the statutory requirement that spousal consent be witnessed either by a notary public or a plan representative appears to presuppose that

a spouse be in the physical presence of the notary public or the plan representative at the time consent is given. This appears to place significant limitations on the utility of electronic media in effecting spousal consent.² Thus, it is unclear what guidance the IRS and Treasury could issue that would meaningfully facilitate paperless distributions in the case of plans subject to sections 401(a)(11) and 417.

Reliance

Plan sponsors and administrators may rely on these final regulations for guidance for distributions made prior to the effective date.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory impact analysis is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the regulations provide paperless alternatives to notices that otherwise must be sent as written paper documents. It is anticipated that most small businesses affected by these regulations will be sponsors of retirement plans. Since these notices are provided only upon distributions and since, in the case of a small plan, there will be relatively few distributions per year, small plans that implement a paperless system for delivering these notices will likely contract for them as part of a paperless system for distributions offered by outside vendors. The paperless delivery of the notices will not add more than a minor increment to the cost of these distribution systems or the plan sponsor will continue to use a paper-based system. Accordingly, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

² One commentator suggested that electronic transmission of spousal consent be permitted if the plan has a reasonable certainty that the spouse has consented. @ That suggested standard appears to fall far short of the witnessing requirement specifically set forth in the statute.

Drafting Information

The principal author of these regulations is Catherine Livingston Fernandez, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), IRS. However, personnel from other offices of the IRS and Treasury Department participated in their development.

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Amendments to the Regulations

Accordingly, 26 CFR parts 1, 35, and 602 are amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.402(f)-1 is amended by:

1. Revising Q&A-2.
2. Adding Q&A-5 and Q&A-6.

The revision and additions read as follows:

§1.402(f)-1 Required explanation of eligible rollover distributions; questions and answers.

* * * * *

Q-2: When must the plan administrator provide the section 402(f) notice to a distributee?

A-2: The plan administrator must provide the section 402(f) notice to a distributee at a time that satisfies either paragraph (a) or (b) of this Q&A-2.

(a) This paragraph (a) is satisfied if the plan administrator provides a distributee with the section 402(f) notice no less than 30 days and no more than 90 days before the date of a distribution. However, if the distributee, after having received the section 402(f) notice, affirmatively elects a distribution, a plan will not fail to satisfy section 402(f) merely because the distribution is made less than 30 days after the section 402(f) notice was provided to the distributee, provided the plan administrator clearly indicates to the distributee that the distributee has a right to consider the decision of whether or not to elect a direct rollover for at least 30 days after the notice is provided. The plan administrator may use any method to inform the distributee of the relevant time period, provided that the method is reasonably designed to

attract the attention of the distributee. For example, this information could be either provided in the section 402(f) notice or stated in a separate document (e.g., attached to the election form) that is provided at the same time as the notice. For purposes of satisfying the requirement in the first sentence of paragraph (a) of this Q&A-2, the plan administrator may substitute the annuity starting date, within the meaning of §1.401(a)-20, Q&A-10, for the date of the distribution.

(b) This paragraph (b) is satisfied if the plan administrator—

(1) Provides a distributee with the section 402(f) notice;

(2) Provides the distributee with a summary of the section 402(f) notice within the time period described in paragraph (a) of this Q&A-2; and

(3) If the distributee so requests after receiving the summary described in paragraph (b)(2) of this Q&A-2, provides the section 402(f) notice to the distributee without charge and no less than 30 days before the date of a distribution (or the annuity starting date), subject to the rules for the distributee's waiver of that 30-day period. The summary described in paragraph (b)(2) of this Q&A-2 must set forth a summary of the principal provisions of the section 402(f) notice (and, in the case of a notice provided in any document containing information in addition to the notice, must identify that document and must provide a reasonable indication of where the notice may be found in that document, such as by index reference or by section heading), and must advise the distributee that, upon request, a copy of the section 402(f) notice will be provided without charge.

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Q-5: Will the requirements of section 402(f) be satisfied if a plan administrator provides a distributee with the section 402(f) notice or the summary of the notice described in paragraph (b)(2) of Q&A-2 of this section other than through a written paper document?

A-5: A plan administrator may provide a distributee with the section 402(f) notice or the summary of that notice described in paragraph (b)(2) of Q&A-2 of this section either on a written paper document or through an electronic medium reasonably

accessible to the distributee. A notice or summary provided through an electronic medium must be provided under a system that satisfies the following requirements:

(a) The system must be reasonably designed to provide the notice or summary in a manner no less understandable to the distributee than a written paper document.

(b) At the time the notice or summary is provided, the distributee must be advised that the distributee may request and receive the notice on a written paper document at no charge, and, upon request, that document must be provided to the distributee at no charge.

Q-6: Are there examples that illustrate the provisions of Q&A-2 and Q&A-5 of this section?

A-6: The following examples illustrate the provisions of Q&A-2 and Q&A-5 of this section:

Example 1. (i) A qualified plan (Plan A) permits participants to request distributions by e-mail. Under Plan A's system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match that in Plan A's records in order for the transaction to proceed. If a participant requests a distribution from Plan A by e-mail and the distribution is an eligible rollover distribution, the plan administrator provides the participant with a section 402(f) notice by e-mail. The plan administrator also advises the participant that he or she may request the section 402(f) 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. To proceed with the distribution by e-mail, the participant must acknowledge receipt, review, and comprehension of the section 402(f) notice.

(ii) In *Example 1*, Plan A does not fail to satisfy the notice requirement of section 402(f) merely because the notice is provided to the participant other than through a written paper document.

Example 2. (i) A qualified plan (Plan B) permits participants to request distributions through the Plan B web site (Internet or intranet). Under Plan B's system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match that in Plan B's records in order for the transaction to proceed. A participant may request a distribution from Plan B by following the applicable instructions on the Plan B web site. After the participant has requested a distribution that is an eligible rollover distribution, the participant is automatically shown a page on the web site containing a section 402(f) notice. Although this page of the web site may be printed, the page also advises the participant that he or she may request the section 402(f) notice on a written paper document by calling a telephone number indicated on the web page and that, if the participant requests the notice on a written paper document, it will be provided at no charge. To proceed with the distribution by e-mail, the participant must acknowledge receipt, review, and comprehension of the section 402(f) notice.

(ii) In this *Example 2*, Plan B does not fail to satisfy the notice requirement of section 402(f) merely because the notice is provided to the participant other than through a written paper document.

Example 3. (i) A qualified plan (Plan C) permits participants to request distributions through Plan C's automated telephone system. Under Plan C's system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match that in Plan C's records in order for the transaction to proceed. Plan C provides the section 402(f) notice in the summary plan description, the most recent version of which was distributed to participants in 1997. A participant may request a distribution from Plan C by following the applicable instructions on the automated telephone system. In 1999, a participant, using Plan C's automated telephone system, requests a distribution that is an eligible rollover distribution. The automated telephone system refers the participant to the most recent version of the section 402(f) notice which was provided in the summary plan description, informs the participant where the section 402(f) notice may be located in the summary plan description, and provides an oral summary of the material provisions of the section 402(f) notice. The system also advises the participant that the participant may request the section 402(f) 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. Before proceeding with the distribution, the participant must acknowledge receipt, review, and comprehension of the summary. Under Plan C's system for processing such transactions, the participant's distribution will be made no more than 90 days and no fewer than 30 days after the participant requests the distribution and receives the summary of the section 402(f) notice (unless the participant waives the 30-day period).

(ii) In this *Example 3*, Plan C does not fail to satisfy the notice requirement of section 402(f) merely because Plan C provides a summary of the section 402(f) notice or merely because the summary is provided to the participant other than through a written paper document.

Example 4. (i) Same facts as *Example 3*, except that, pursuant to Plan C'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 summary of the section 402(f) notice by reading from a prepared text.

(ii) In this *Example 4*, Plan C does not fail to satisfy the notice requirement of section 402(f) merely because Plan C provides a summary of the section 402(f) notice or merely because the summary of the section 402(f) notice is provided to the participant other than through a written paper document.

Example 5. (i) Same facts as *Example 3*, except that Plan C does not provide the section 402(f) notice in the summary plan description. Instead, the automated telephone system reads the section 402(f) notice to the participant.

(ii) In this *Example 5*, Plan C does not satisfy the notice requirement of section 402(f) because oral delivery alone of the section 402(f) notice through the automated telephone system is not sufficient.

Example 6. (i) The facts are the same as in *Example 1*, except that Participant D requested a distri-

bution by e-mail, then terminated employment, and, following the termination, no longer has reasonable access to Plan A e-mail.

(ii) In this *Example 6*, Plan A does not satisfy the notice requirement of section 402(f) because the electronic medium through which the notice is provided is not reasonably accessible to Participant D. Plan A must provide the section 402(f) notice to Participant D in a written paper document or by an electronic means that is reasonably accessible to Participant D.

Par. 3. Section 1.411(a)-11 is amended by:

1. Revising paragraphs (c)(2)(i) and (iii).

2. Removing the language “Written consent” in paragraph (c)(2)(ii) and (c)(3) and adding “Consent” in its place.

3. Adding paragraphs (f) and (g).

The revisions and additions read as follows:

§1.411(a)-11 Restriction and valuation of distributions.

* * * * *

(c) * * *

(2) *Consent.* (i) No consent is valid unless the participant has received a general description of the material features of the optional forms of benefit available under the plan. In addition, so long as a benefit is immediately distributable, a participant must be informed of the right, if any, to defer receipt of the distribution. Furthermore, consent is not valid if a significant detriment is imposed under the plan on any participant who does not consent to a distribution. Whether or not a significant detriment is imposed shall be determined by the Commissioner by examining the particular facts and circumstances.

* * * * *

(iii) A plan must provide a participant with notice of the rights specified in this paragraph (c)(2) at a time that satisfies either paragraph (c)(2)(iii)(A) or (B) of this section:

(A) This paragraph (c)(2)(iii)(A) is satisfied if the plan provides a participant with notice of the rights specified in this paragraph (c)(2) no less than 30 days and no more than 90 days before the date the distribution commences. However, if the participant, after having received this notice, affirmatively elects a distribution, a plan will not fail to satisfy the consent requirement of section 411(a)(11) merely because the distribution commences less than 30 days after the notice was provided to the participant, provided the plan ad-

ministrator clearly indicates to the participant that the participant has a right to at least 30 days to consider whether to consent to the distribution.

(B) This paragraph (c)(2)(iii)(B) is satisfied if the plan—

(1) Provides the participant with notice of the rights specified in this paragraph (c)(2);

(2) Provides the participant with a summary of the notice within the time period described in paragraph (c)(2)(iii)(A) of this section; and

(3) If the participant so requests after receiving the summary described in paragraph (c)(2)(iii)(B)(2) of this section, provides the notice to the participant without charge and no less than 30 days before the date the distribution commences, subject to the rules for the participant’s waiver of that 30-day period. The summary described in paragraph (c)(2)(iii)(B)(2) of this section must advise the participant of the right, if any, to defer receipt of the distribution, must set forth a summary of the distribution options under the plan, must refer the participant to the most recent version of the notice (and, in the case of a notice provided in any document containing information in addition to the notice, must identify that document and must provide a reasonable indication of where the notice may be found in that document, such as by index reference or by section heading), and must advise the participant that, upon request, a copy of the notice will be provided without charge.

* * * * *

(f) *Medium for notice and consent—*

(1) *Notice.* The notice of a participant’s rights described in paragraph (c)(2) of this section or the summary of that notice described in paragraph (c)(2)(iii)(B)(2) of this section may be provided either on a written paper document or through an electronic medium reasonably accessible to the participant. A notice or summary provided through an electronic medium must be provided under a system that satisfies the following requirements:

(i) The system must be reasonably designed to provide the notice or summary in a manner no less understandable to the participant than a written paper document.

(ii) At the time the notice or summary is provided, the participant must be advised that he or she may request and re-

ceive the notice on a written paper document at no charge, and, upon request, that document must be provided to the participant at no charge.

(2) *Consent.* The consent described in paragraphs (c)(2) and (3) of this section may be given either on a written paper document or through an electronic medium reasonably accessible to the participant. A consent given through an electronic medium must be given under a system that satisfies the following requirements:

(i) The system must be reasonably designed to preclude any individual other than the participant from giving the consent.

(ii) 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.

(iii) The system must provide the participant, within a reasonable time after the consent is given, a confirmation of the terms (including the form) of the distribution either on a written paper document or through an electronic medium under a system that satisfies the requirements of paragraph (f)(1) of this section.

(g) *Examples.* The provisions of paragraph (f) of this section are illustrated by the following examples:

Example 1. (i) A qualified plan (Plan A) permits participants to request distributions by e-mail. Under Plan A’s system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match that in Plan A’s records in order for the transaction to proceed. If a participant requests a distribution from Plan A 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. To proceed with the distribution by e-mail, the participant must acknowledge receipt, review, and comprehension of the section 411(a)(11) notice and must consent to the distribution within the time required under section 411(a)(11). Within a reasonable time after the participant’s consent by e-mail, the plan administrator, by e-mail, sends confirmation of the terms (including the form) of the distribution to the participant and advises the participant that he or she may request the confirmation on a written paper document that will be provided at no charge.

(ii) In this *Example 1*, Plan A does not fail to satisfy the notice or consent requirement of section 411(a)(11) merely because the notice and consent are provided other than through written paper documents.

Example 2. (i) Same facts as *Example 1*, except that, instead of sending a confirmation of the distribution by e-mail, the plan administrator, within a reasonable time after the participant's consent, sends the participant an account statement for the period that includes information reflecting the terms of the distribution.

(ii) In this *Example 2*, Plan A does not fail to satisfy the consent requirement of section 411(a)(11) merely because the consent is provided other than through a written paper document.

Example 3. (i) A qualified plan (Plan B) permits participants to request distributions through the Plan B web site (Internet or intranet). Under Plan B's system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match that in Plan B's records in order for the transaction to proceed. A participant may request a distribution from Plan B by following the applicable instructions on the Plan B web site. After the participant has requested a distribution, the participant is automatically shown a page on the web site containing a section 411(a)(11) notice. Although this page of the web site may be printed, the page also advises the participant that he or she may request the section 411(a)(11) notice on a written paper document by calling a telephone number indicated on the web page and that, if the participant requests the notice on a written paper document, it will be provided at no charge. To proceed with the distribution by e-mail, the participant must acknowledge receipt, review, and comprehension of the section 411(a)(11) notice and must consent to the distribution within the time required under section 411(a)(11). The web site requires the participant to review and confirm the terms (including the form) of the distribution before the transaction is completed. After the participant has given consent via e-mail, the Plan B web site confirms the distribution to the participant and advises the participant that he or she may request the confirmation on a written paper document that will be provided at no charge.

(ii) In this *Example 3*, Plan B does not fail to satisfy the notice or consent requirement of section 411(a)(11) merely because the notice and consent are provided other than through written paper documents.

Example 4. (i) A qualified plan (Plan C) permits participants to request distributions through Plan C's automated telephone system. Under Plan C's system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match that in Plan C's records in order for the transaction to proceed. Plan C provides only the following distribution options: a lump sum and annual installments over 5, 10, or 20 years. A participant may request a distribution from Plan C by following the applicable instructions on the automated telephone system. After the participant has requested a distribution, the automated telephone system reads the section 411(a)(11) notice to the participant. The automated telephone system also advises the participant that he or she may request the 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. Before proceeding with the distribution transaction, the participant must acknowledge receipt, review, and comprehension of the section 411(a)(11) notice and must consent to the distribution within the time required under section 411(a)(11). The automated telephone system requires the participant to

review and confirm the terms (including the form) of the distribution before the transaction is completed. After the participant has given consent, the automated telephone system confirms the distribution to the participant and advises the participant that he or she may request the confirmation on a written paper document that will be provided at no charge. Because Plan C has relatively few and simple distribution options, the provision of the section 411(a)(11) notice over the automated telephone system is no less understandable to the participant than a written paper notice.

(ii) In this *Example 4*, Plan C does not fail to satisfy the notice or consent requirement of section 411(a)(11) merely because the notice and consent are provided other than through written paper documents.

Example 5. (i) Same facts as *Example 4*, except that, pursuant to Plan C'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 predetermined instructions of the plan administrator.

(ii) In this *Example 5*, Plan C does not fail to satisfy the notice or consent requirement of section 411(a)(11) merely because the notice and consent are provided other than through written paper documents.

Example 6. (i) Same facts as *Example 1*, except that Participant D requested a distribution by e-mail, then terminated employment and, following the termination, no longer has access to e-mail.

(ii) In this *Example 6*, Plan A does not satisfy the notice or consent requirement of section 411(a)(11) because the electronic medium through which the notice is provided is not reasonably accessible to Participant D. Plan A must provide Participant D the section 411(a)(11) notice in a written paper document or by an electronic means that is reasonably accessible to Participant D.

Par. 4. The heading for part 35 is revised to read as follows:

**PART 35—EMPLOYMENT TAX AND
COLLECTION OF INCOME TAX AT
SOURCE REGULATIONS UNDER
THE TAX EQUITY AND FISCAL
RESPONSIBILITY ACT OF 1982**

Par. 5. The authority citation for part 35 is revised to read as follows:

Authority: 26 U.S.C. 6047(e), 7805; 68A Stat. 917; 96 Stat. 625; Public Law 97-248 (96 Stat. 623).

Section 35.3405-1 also issued under 26 U.S.C. 3405(e)(10)(B)(iii).

Section 35.3405-1T also issued under 26 U.S.C. 3405(e)(10)(B)(iii).

Par. 6. Redesignate §35.3405-1 as §35.3405-1T and revise the heading to read as follows:

§35.3405-1T Questions and answers relating to withholding on pensions, annuities, and certain other deferred income (temporary regulations).
* * * * *

Par. 7. A new §35.3405-1 is added to read as follows:

§35.3405-1 Questions and answers relating to withholding on pensions, annuities, and certain other deferred income.

The following questions and answers relate to withholding on pensions, annuities, and other deferred income under section 3405 of the Internal Revenue Code of 1986, as added by section 334 of the Tax Equity and Fiscal Responsibility Tax Act of 1982 (Pub. L. 97-248) (TEFRA).

a-1 through d-34 [Reserved] For further guidance, see §35.3405-1T.

* * * * *

d-35. Q. Through what medium may a payor provide the notice required under section 3405 to a payee?

A. A payor may provide the notice required under section 3405 (including the abbreviated notice described in d-27 of §35.3405-1T and the annual notice described in d-31 of §35.3405-1T) to a payee either on a written paper document or through an electronic medium reasonably accessible to the payee. A notice provided through an electronic medium must be provided under a system that satisfies the following requirements:

(a) The system must be reasonably designed to provide the notice in a manner no less understandable to the payee than a written paper document.

(b) At the time the notice is provided, the payee must be advised that the payee may request and receive the notice on a written paper document at no charge, and, upon request, that document must be provided to the payee at no charge.

d-36. Q. Are there examples that illustrate the provisions of d-35 of this section?

A. The provisions of d-35 of this section are illustrated by the following examples:

Example 1. (i) An employer deferred compensation plan (Plan A) permits participants to request distributions by e-mail. Under Plan A's system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match that in Plan A's records in order for the transaction to proceed. The plan administrator is the payor. If a participant requests a distribution from Plan A by e-mail, the plan administrator provides the participant with the notice required under section 3405 by e-mail. The plan administrator also advises the participant by e-mail that he or she may request the 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. To proceed with the distribution by e-mail,

the participant must acknowledge receipt, review, and comprehension of the notice.

(ii) In this *Example 1*, the plan administrator does not fail to satisfy the notice requirement of section 3405 merely because the notice is provided to the participant other than through a written paper document.

Example 2. (i) An employer deferred compensation plan (Plan B) permits participants to request distributions through the Plan B web site (Internet or intranet). Under Plan B's system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match that in Plan B's records in order for the transaction to proceed. The plan administrator is the payor. A participant may request a distribution from Plan B by following the applicable instructions on the Plan B web site. After the participant has requested a distribution, the participant is automatically shown a page on the web site containing the notice required by section 3405. Although this page of the web site may be printed, the page also advises the participant that he or she may request the 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. To proceed with the distribution through the web site, the participant must acknowledge receipt, review, and comprehension of the notice.

(ii) In this *Example 2*, the plan administrator does not fail to satisfy the notice requirement of section 3405 merely because the notice is provided to the participant other than through a written paper document.

Example 3. (i) An employer deferred compensation plan (Plan C) permits participants to request distributions through Plan C's automated telephone system. Under Plan C's system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match that in Plan C's records in order for the

transaction to proceed. The plan administrator is the payor. A participant may request a distribution from Plan C by following the applicable instructions on the automated telephone system. After the participant has requested a distribution, the automated telephone system reads the notice required by section 3405 to the participant. The automated telephone system also advises the participant that he or she may request the 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. Before proceeding with the distribution transaction, the participant must acknowledge receipt, review, and comprehension of the notice.

(ii) In this *Example 3*, the plan administrator does not fail to satisfy the notice requirement of section 3405 merely because the notice is provided to the participant other than through a written paper document.

Example 4. (i) Same facts as *Example 3*, except that, pursuant to the 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 notice required by section 3405 by reading from a prepared text.

(ii) *Conclusion.* In this *Example 4*, the plan administrator does not fail to satisfy the notice requirement of section 3405 merely because the notice is provided to the participant other than through a written paper document.

Example 5. (I) Same facts as *Example 1*, except that Participant D requested a distribution by e-mail and then terminated employment. Participant D no longer has access to e-mail.

(ii) In *this Example 5*, Plan A does not satisfy the notice requirement of section 3405 because the electronic medium through which the notice is provided is not reasonably accessible to Participant D. Plan A

must provide the notice required by section 3405 to Participant D in a written paper document or by an electronic medium that is reasonably accessible to Participant D.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 6. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 7. In §602.101, paragraph (b) is amended by adding the following entry in the table in numerical order to read as follows:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

Robert E. Wenzel,
*Deputy Commissioner
of Internal Revenue.*

Approved January 20, 2000.

Jonathan Talisman,
*Acting Assistant Secretary
of the Treasury.*

(Filed by the Office of the Federal Register on February 7, 2000, 8:45 a.m., and published in the issue of the Federal Register for February 8, 2000, 65 F.R. 6001)

CFR Part or Section Where
Identified and Described

Current OMB
Control No.

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1.402(f)-11545-1632

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1.411(a)-111545-1632
