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MEMORANDUM TO CLIENTS

August 2, 2005

Re: Proposed IRS Rules on Use of Electronic Technologies

In 2000, the IRS issued final rules on electronic transmittal of notices under Code sections 402(f) (direct rollovers) and 3405(e)(10)(B) (withholding notices for distributions not eligible for rollover treatment) and consent for distributions required under Code section 411(a)(11). More recently, the IRS addressed electronic delivery of ERISA section 204(h) notices (notice of significant reduction in the rate of future benefit accrual) and notices to interested parties under Code section 7476.

The IRS recently issued proposed regulations on the use of electronic media to satisfy most of the notice and consent requirements under the Code affecting employee benefit plans. 70 Fed. Reg. 40675 (July 14, 2005). The new proposed regulations would replace the existing piecemeal IRS guidance noted above, and generally would apply to any notice or other communication to or from a participant or beneficiary that is required to be in writing. Thus, the proposals not only would cover electronic communications that have already been addressed by IRS (e.g., rollover and § 204(h) notices), but also would extend to most other types of employee benefit plan communications otherwise required to be in writing, such as QJSA notices/spousal consents and safe harbor 401(k) plan notices. The regulations generally would also serve as a safe harbor for any other employee benefit plan communications not required to be in writing. However, the regulations would not apply for tax reporting or expense substantiation purposes, or to any communications over which DOL or PBGC has interpretive or regulatory authority.

The proposed IRS rules incorporate the "consumer consent" requirements enacted in 2000 under the Electronic Signatures in Global and National Commerce Act ("E-SIGN"). Fortunately, they also retain the less burdensome provisions of the 2000 IRS regulations (with some modifications) as an alternative method of compliance.

In 2002, DOL issued comprehensive final regulations on electronic communications and recordkeeping for purposes of the requirements of Title I of ERISA, reflecting DOL's application of E-Sign to matters under their jurisdiction. It is unfortunate that the Agencies could not agree on a uniform set of rules in this area that broadly affects plan administration. A helpful chart comparing (and explaining) the provisions of the new proposed IRS regulations with the final DOL regulations is enclosed.

The new IRS rules would apply prospectively, no earlier than the date final regulations are published, and may not be relied upon until then (aside from specific areas where guidance has previously been issued). A public hearing on the proposed IRS rules is scheduled for November 2, with comments due by October 12.

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Please call Lou Mazawey, Christy Tinnes or Elena Barone if you have questions in this area.