Electronic Signature of Retirement Plan Documents

By Timothy M. McCutcheon

Electronic transactions and e-signatures are becoming commonplace. Significant transactions such as real estate contracts and loan agreements are increasingly being executed electronically due to the efficiencies involved in paperless transactions. In the retirement plan arena, many participant-level transactions including investment changes, distribution requests, etc., are done electronically, but there apparently is little use of e-signatures in signing retirement plan documents and amendments. Because Internal Revenue Service ("IRS") procedures may require every retirement plan to be amended as often as each year, use of e-signatures could make the retirement plan industry more efficient and possibly help reduce plan administration costs, which in most cases are ultimately borne by plan participants.

This article reviews the applicable law relating to e-signature of retirement plan documents, the reaction of the Internal Revenue Service to recent e-sign legislation, and proposes a procedure for e-signing retirement plan documents that should meet such legal requirements.

Applicable Law

Employee Retirement Income Security Act

Section 402(a)(1) of the Employee Retirement Income Security Act ("ERISA") requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." ERISA further requires that every employee benefit plan shall "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." [ERISA § 402(b)(3)]

The meanings of these provisions of ERISA were fleshed out in a leading U.S. Supreme Court case *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). In *Schoonejongen*, Curtiss-Wright amended a post-retirement health care plan to provide that coverage under the plan would cease for retirees upon the termination of business operations in the facility from which they retired. Curtiss-Wright argued that the plan documents did contain an amendment procedure, namely, a standard reservation clause that stated: "The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." Schoonejongen and several of his fellow retirees sued Curtiss-Wright alleging that the reservation clause in the plan was deficient under ERISA Section 402(b)(3).

In finding in favor of Curtiss-Wright Corp., the Court used general corporate law principles in finding that the post-retirement health care plan contained a valid procedure under ERISA Section 402(b)(3):

> [P]rinciples of corporate law provide a ready-made set of rules for determining, in whatever context, who has authority to make decisions on behalf of a company. Consider, for example, an ordinary sales contract between "Company X" and a third party. We would not think of regarding the contract as meaningless, and thus unenforceable, simply because it does not specify on its face exactly who within "Company X" has the power to enter into such an agreement or carry out its terms. Rather, we would look to corporate law principles to give "Company X"

Timothy M. McCutcheon is the general manager and founder of ftwilliam.com. He is a member of the Plan Documents Subcommittee of ASPPA and the Great Lakes TE/GE Council and a former member of the Information Reporting Program Advisory Committee of the IRS. Prior to founding ftwilliam.com, his law practice included counseling benefit service providers regarding product design and compliance.

> content. See 2 W. Fletcher, Cyclopedia of Law of Private Corporations §466, p. 505 (rev. ed. 1990) ("[A] corporation is bound by contracts entered into by its officers and agents acting on behalf of the corporation and for its benefit, provided they act within the scope of their express or implied powers"). So too here.

The *Schoonejongen* case makes it clear that any plan with a standard reservations clause like the one in the Curtiss-Wright plan may be amended "by [a corporation's] officers and agents acting on behalf of the corporation and for its benefit, provided they act within the scope of their express or implied powers."

Recent Statutes Enabling Electronic Signatures

In 1999, the National Conference of State Legislatures drafted the Uniform Electronic Transactions Act ("UETA") in response to what the group saw as unnecessary barriers to electronic commerce. One of these barriers included requirements that certain contracts be set forth on paper and contain an ink signature. After the national conference issued the draft law, the U.S. Congress took notice and passed the Electronic Signatures in Global and National Commerce Act ("ESIGN") on June 30, 2000. The ESIGN act was based largely on UETA and its stated purpose is "[t]o facilitate the use of electronic records and signatures in interstate or foreign commerce."

Electronic Signatures in Global and National Commerce Act

The core of ESIGN is found in Section 101(a) which provides:

> Notwithstanding any statute, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce
>
> > (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
> >
> > (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

The other applicable substantive rule in ESIGN is found in the definitions section which provides a definition of electronic signature: "The term 'electronic signature' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." [ESIGN § 106(5)]

ESIGN also pre-empts all state law except: (1) the UETA, or (2) any other state law that specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures that are consistent with ESIGN. [ESIGN § 102]

There are also many exceptions to the law including exceptions for contracts or other records to the extent they are governed by: (1) a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts; or (2) a state statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law; and (3) several exceptions to consumer-related transactions and notices. [ESIGN § 103] The law gives the power to federal agencies to interpret ESIGN provided that such guidance: (1) is consistent with ESIGN, (2) does not add to the requirements of ESIGN, and (3) the agency finds, in connection with the issuance of guidance, that there is a substantial justification for the regulation. [ESIGN § 104(b)(2)]

Based on the foregoing, it is clear that ESIGN applies to ERISA Section 402(b)(3) (which requires a procedure to amend a plan). It is also clear that IRS and U.S Department of Labor ("DOL") could not issue a regulation to limit ESIGN's application to ERISA. Thus, ERISA Section 402(b)(3) cannot be read to require manual signature of a plan document after ESIGN. Note that ERISA requires each plan to include an amendment procedure. If such procedure requires a manual signature, it may be necessary even though ESIGN would not otherwise require it.

As was mentioned above, ESIGN generally pre-empts all state statutes except UETA. Since UETA has been adopted in all but three states (Washington, Illinois, and New York), it is arguably the substantive law that guides e-signatures in all but three states. We will next discuss the provisions of UETA as the commentary to the model act provides practical examples of how e-signatures would work in real life.

Uniform Electronic Transactions Act

UETA fills in many of the blanks left by ESIGN. For example, Section 5 of UETA provides that parties must agree to use electronic signatures. In the context of employee benefit plan documents, there is only

one party (the company/sponsor) that needs to sign the document. Merely executing a plan document via electronic means by an authorized representative of the company should be deemed an agreement to use e-signatures.

In addition, Section 9 provides that an electronic record or electronic signature is attributable to a person if it was the act of the person. UETA states that the act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable. The drafting comments to Section 2 of UETA, which defines Electronic Signature in exactly the same way as ESIGN, provides insight as to what constitutes a valid e-signature:

> Illustration 2: A sends the following e-mail to B: "I hereby offer to buy 100 widgets for $1000, delivery next Tuesday. /s/ A." B responds with the following e-mail: "I accept your offer to purchase 100 widgets for $1000, delivery next Tuesday. /s/ B." ….. The transaction may not be denied legal effect solely because there is not a pen and ink 'writing' or 'signature'. [Comment 7 to Section 2 of UETA]

Thus, it is apparent that any digital "X" would constitute a valid e-signature.

Application of ESIGN and UETA to ERISA Benefit Plans

Likely the most telling indication that Congress intended ESIGN to apply to employee benefit plans was an exchange between Senators Gramm and Abraham while the ESIGN bill was being debated in the Senate. The exchange is set forth below:

> Mr. GRAMM. It is my understanding that this act, for example, covers…all activities relating to employee benefit plans or any other type of tax-favored plan, annuity or account such as an IRA, a 403(b) annuity, or an education savings program, including all related tax and other required filings and reports. Is this correct?
>
> Mr. ABRAHAM. Yes, and as a result, the act would apply to such activities as the execution of a prototype plan adoption agreement by an employer, the execution of an IRA application by an individual, and the waiver of a qualified joint and survivor annuity by a plan participant's spouse and the designation of any beneficiary in connection with any retirement, pension, or deferred compensation plan, IRA, qualified State tuition program, insurance or annuity contract, or agreement to transfer ownership upon the death of a party to a transaction. [Congressional Record Vol. 146, Num. 76 P. S5283]

Thus, it is quite clear that Congress intended the ESIGN act to apply to "employee benefit plans or any other type of tax-favored plan, annuity or account."

Internal Revenue Service Reaction to ESIGN and UETA

The foregoing discussion makes it clear that Congress and an overwhelming number of states intended that nearly all documents, including employee benefit plan documents, may be signed using an electronic signature and that any digital "X" would be sufficient, including a mere exchange of emails. With the law so clear, one would imagine that the IRS would have embraced e-signatures, particularly as a way to lessen the burden placed on plan sponsors and third-party administrators under the IRS' interim amendment procedures which require that retirement plans be timely amended for changes in law or regulation.

Unfortunately, there is rather meager guidance from the IRS. The guidance that exists is solely limited to preapproved plans and to IRS agents reviewing determination letter applications. There is no guidance directed at agents performing plan audits as part of the examination function, although the principles laid out in the determination letter guidance should have equal application in the examinations of plans.

IRS Revenue Procedure 2011-49 provides extensive rules regarding the IRS preapproved program for prototype and volume submitter documents. Section 5.11 of this revenue procedure provides that for a prototype plan, "[t]he signature requirement may be satisfied by an electronic signature that reliably authenticates and verifies the adoption of the adoption agreement, or restatement, amendment or modification thereof, by the employer." There is similar language allowing e-signatures in Section 14.05 of the Revenue Procedure which deals with volume submitter plans. Please note that the guidance in Revenue Procedure 2011-49 does not extend to nonpreapproved plans such as cash balance plans, ESOPs, or welfare plans. Also note that the guidance merely tells us what the ESIGN statute already clearly provides.

The only other guidance on e-signatures for benefit plans from the IRS is in the form of Q&A 10 on the "Retirement Plans FAQs regarding the Determination

Letter Process" page on the IRS Web site. [*http://www.irs.gov/Retirement-Plans/Retirement-Plans-FAQs-regarding-the-Determination-Letter-Process*] This Q&A also only appears to apply to preapproved plans filing for a favorable determination letter but does appear to flesh out some of the requirements for e-signatures. The Q&A states that a valid e-signature may be documented by:

> …includ[ing] with the determination letter application a statement from the master & prototype sponsor that the employer electronically signed the adoption agreement through a system that reliably authenticates and verifies the employer's adoption of the adoption agreement. The statement must also indicate the date on which the employer electronically signed the adoption agreement. The master & prototype sponsor's statement attesting to the employer's electronic signature would have to be signed by the master & prototype sponsor (the IRS will accept a facsimile signature on the statement).
>
> As an alternative, the employer could submit dated correspondence from the master & prototype sponsor acknowledging receipt of the employer's electronically signed adoption agreement. Other types of information may also be acceptable. Failure to include sufficient information with the determination letter application to allow the IRS to determine when the plan or amendment was adopted application may lead to requests for additional information from the IRS and delays in processing the application.

While not related to e-signature of benefit plan documents, in Announcement 2013-8, the IRS recently sought recommendations on e-signature standards for IRS tax forms, statements, applications, information requests, and similar transactions. In this Announcement, the IRS expressed its support for e-signatures and recognized the efficiencies e-signatures bring to both taxpayers and the IRS. The IRS also outlined five core e-signature requirements:

1. A person (i.e., the signer) must use an acceptable electronic form of signature;
2. The electronic form of signature must be executed or adopted by a person with the intent to sign the electronic record (e.g., to indicate a person's approval of the information contained in the electronic record);
3. The electronic form of signature must be attached to or associated with the electronic record being signed;
4. There must be a means to identify and authenticate a particular person as the signer; and
5. There must be a means to preserve the integrity of the signed record.

In the absence of comprehensive guidance from the IRS, what is a practitioner to do if it wants to implement a system of e-signatures? The next section discusses such a recommendation.

How to ESIGN a Benefit Plan Document

Even though the IRS has provided limited guidance on e-signatures, the DOL has recently implemented an e-signature process for e-filing Forms 5500. This new process can provide the basis of a model for e-signature of plan documents.

As was mentioned above, Section 9 of UETA requires that an e-signature process must be able to verify/ensure that the electronic signature is of the person it claims to be. UETA states that the act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable. DOL meets this requirement by forcing a person who intends to sign a 5500 to log into the DOL Web site and obtain a user name and PIN. However, there are less burdensome ways to meet this requirement. Many software vendors offer plan sponsor Web portals that allow selected employees of the plan sponsor to log into the portal to retrieve, send, and receive sensitive documents in a secure fashion. The security of these systems is ensured by providing the employee of the plan sponsor with a secure user name and password. The Web portal system would seem to meet the requirements of Section 9 of UETA. In fact, this method (password-protected, third-party site) was explicitly recognized by the IRS in the context of e-signing plan loan applications in Treas. Reg. Section 1.401(a)-21 Ex 3.

In light of the foregoing, it would seem that a system meeting the broad outline specified below would meet the requirements of ESIGN/UETA:

1. Provide login credentials to a Web portal maintained by a software vendor in a secure fashion to the person designated by the plan sponsor as the person empowered to sign plan documents/amendments ("Designated Person").
2. Send an email or other communication to the Designated Person informing him/her that the document is ready for signature.

3. After the Designated Person logs in to the software vendor-maintained Web portal, present him/her with a screen that asks for confirmation of his/her name. The Designated Person must then click on a link to download the document/amendment that is to be signed.
4. After the document is downloaded, prompt the Designated Person to type his or her electronic signature. The signing page will contain language that the Designated Person agrees to e-sign the document and that by clicking on the "Sign" button the Designated Person has read the document/amendment and that typing his or her name will have the same legal effect as his or her handwritten signature.
5. Once the Designated Person e-signs the document, record the signature through the third-party software.
6. The electronic signature would be attached to or associated with the electronic document being signed and a record maintained of the signature and document.

Conclusion

It is clear from the federal ESIGN statute and the state UETA statute that e-signatures are permitted on benefit plan documents and that any digital "X" will suffice. It would be helpful for the IRS to issue more specific guidance on e-signature requirements that would pass muster on examination and to issue guidance that clearly extends the guidance to nonpreapproved plans. In the absence of such guidance, retirement plan providers should consult with qualified ERISA counsel to develop procedures to implement e-signatures. ■