

ELECTRONIC SIGNATURES FOR PRE-APPROVED DOCUMENTS

Executive Summary

The IRS has indicated in written guidance that e-signatures may be used to sign a pre-approved document and/or amendment (whether volume submitter or prototype). The IRS has not provided detailed guidance to explain how the e-signature must be accomplished and the IRS has specifically refused to indicate whether e-signatures can be used for individually drafted plans.

Even though there is no concrete guidance from the IRS outlining procedures necessary to e-signing a pre-approved qualified retirement plan document, we believe that the ftwPortal Pro System would provide an e-signature capability acceptable to IRS. We further believe that there is no logical reason why non-pre-approved plans could not use e-signatures.

Background - Law on E-Signature

Electronic Signatures in Global and National Commerce Act (E-SIGN).

The purpose of this federal law was to: "facilitate the use of electronic records and signatures in interstate or foreign commerce." The law provided that " (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 committee reports that accompanied E-SIGN made it clear that any digital signature should work. House Report 106-341 stated:

Electronic signatures can range from simply typing a name at the end of an email message, to a digital signature to a unique biometric identifier such as a fingerprint or iris scan.

The Committee intends that the definition of electronic signature cover a broad range of electronic signature technologies that can be used to sign an electronic record. This includes, but is not limited to, digital signature technology, a personal identification number (PIN), biometric technologies (such as fingerprints, iris scans, or signature dynamics), and any new electronic signature technologies that may be developed or used in the future.

In addition, an exchange between two Senators debating the bill made it clear that E-SIGN applies to qualified plans:

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.

E-SIGN also allowed states to fine-tune the E-SIGN law provided that the state laws were not inconsistent with E-SIGN. Most states responded by passing the Uniform Electronic Transactions Act (UETA).

Uniform Electronic Transactions Act (UETA)

Uniform Electronic Transactions Act (UETA) was drafted by the National Conference of Commissioners on Uniform State Laws and has been adopted by all 50 states except Washington, Illinois and New York. Therefore, federal E-SIGN is the law in effect in Washington, Illinois and New York and UETA is the law in all other states. UETA is substantially similar to federal E-SIGN and, further, the drafting notes to UETA provide insight as to what may constitute a valid e-signature. The drafting notes provide the following example of an e-signature:

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".

UETA also requires a security procedure "for the purpose of verifying that an electronic signature, record, or performance is that of a specific person.... The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures." Again the drafting notes illustrate what may constitute a valid security procedure:

A security procedure may be technologically very sophisticated, such as an asymmetric cryptographic system.... It may include the use of a mother's maiden name or a personal identification number (PIN). Each of these examples is a method for confirming the identity of a person or accuracy of a message.

Background - Existing IRS Guidance on E-signature

Since the issuance of Revenue Procedure 2005-16, IRS has recognized that pre-approved documents and amendments may be signed via electronic signature. This guidance was updated in Revenue Procedure 2011-49, Section 5.11 which provides the following for prototype documents:

The 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.

Revenue Procedure 2011-49 provides similar language for volume submitter documents.

In Q&A's published on the IRS website under "Retirement Plans FAQs regarding the Determination Letter Process" the IRS elaborated somewhat on the documentation necessary for documents signed via electronic signature.

FAQs - DL Process - If I electronically sign my plan adoption agreement, do I need to submit any additional information with the application?

Revenue Procedure 2011-49, section 5.11 requires an adopting employer of a master & prototype plan to sign the adoption agreement when the plan is adopted or restated and when adoption agreement elections are made or changed by the employer. This requirement may be satisfied by an electronic signature that reliably authenticates

and verifies the employer's adoption of the adoption agreement, or restatement, amendment or modification thereof.

During the review of a determination letter application for a plan, the IRS checks whether the plan and amendments have been timely adopted. If an adopting employer of a master & prototype plan has electronically signed the adoption agreement, the employer should include information that will allow the IRS to determine that the plan or amendment was timely adopted with the determination letter application for the plan. For example, if the employer electronically signed the adoption agreement through a system maintained by the master & prototype sponsor, the employer may include 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.

<http://www.irs.gov/retirement/article/0,,id=254495,00.html>

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.

Approach Taken by Wolters Kluwer (ftwilliam.com) to E-Signature

The e-signing ceremony in the ftwPortal Pro System for plan documents/amendments works very much like the web-based 5500 signing ceremony for the new EFAST 2 system. The e-signing ceremony would proceed as follows:

1. ftwilliam.com customer sends an invitation to the document signer.

2. After logging in to the ftwPortal Pro System, the document signer is presented with a screen that asks the signer to confirm his/her name. The signer must then click on a link to download the document/amendment that is to be signed.
3. After the document is downloaded, the document is electronically signed.
4. A record is made of the document and the signature for future reference which may be downloaded at any time to verify the employer's adoption of the document.

Please note that the only signing credentials required are a portal user login to the ftwPortal Pro System. There is no need for the signer to receive any other signing credentials such as a user ID or PIN from a governmental agency.

Conclusion

It is clear from the federal E-SIGN statute and the state UETA statute that e-signatures are permitted on qualified plan documents and that any digital "X" will suffice.

All of the guidance from the IRS on e-signatures has been from the determination letter section. However, no guidance has been published by the examinations section to guide plan auditors who may encounter e-signatures during an audit. Thus, there is some risk that an e-signature could be challenged on audit. In addition, the IRS has not specifically authorized the use of e-signatures with non-pre-approved plans such as ESOPs and Cash Balance Plans.

Even though there is a lack of concrete guidance from IRS as to procedures necessary to e-signing a pre-approved qualified retirement plan document, we believe that the ftwPortal Pro System will "reliably authenticate and verify the employer's adoption of the adoption agreement, or restatement, amendment or modification thereof."