

Consenting Adults? Tackling the Challenges of Electronic Delivery of 3921/3922

(P A R T I)

As the equity compensation community has gotten comfortable with the IRC 6039 reporting regulation, we often get questions about submitting Forms 3921 and 3922 electronically. This day in age, it only makes sense that companies would want the ease and green option to send their yearend tax reporting forms electronically, BUT as with many things, the IRS doesn't make it easy.

While many of you may be dreading the looming January 31st mailing deadline, we thought we'd take a closer look...

While the pain of the recent participant forms is still fresh in our minds, we thought we'd take a closer look at one way to make this process easier next year: electronic delivery. We had a few clients and friends opt for electronic delivery and we think it will be more popular year after year until finally all the forms are sent electronically.

It's green, it's easier for stock plan professionals, it's may be less expensive...what's not to love?

The answer: complying with the IRS' requirements around electronic delivery of tax forms. They can be a bit, um, onerous. The time has come to break down the requirements (§31.6051-1(j) of the Regulations on Employment Taxes and Collection of Income Tax at the Source) and find ways to tackle them, one by one:

Participant Consent

This is the requirement at which many balk. The IRS requires affirmative consent from the participant for electronic delivery of the forms. Affirmative consent means that the employee must opt in, rather than opting out and you can't interpret failure to respond as an opt in.

Manner of consent

The regs say "The consent may be made electronically in any manner that reasonably demonstrates that the recipient can access the Form W-2 in the electronic format in which it will be furnished to the recipient."

The regs go on to give examples of website and email consent and statement delivery. But the underlying point is that the way you collect consent must involve the way you are planning to deliver consent. If you're planning to email out PDFs, then you need to email out consent forms in PDF so you can "demonstrate" that the participants a) can receive email and b) can open a PDF. You get the idea...

This is a fairly easy requirement with which to comply. Especially since the regs also state that you can use a paper consent form if the confirmation is electronic.

If you're going to use email, you can send an email asking for consent. (However, compiling a list of consents from email response would be manual and labor-intensive.) Better to use email to distribute a link to a survey or website, from which you can download the results and import the consents (or lack thereof) into your stock plan system so that you'll know to which participants you'll need to send a paper form. There are a number of low cost/no cost survey providers out there and or there are providers (like SOS) that have built websites specifically for collection of consent.

Withdrawal of consent

The participant must be able to withdraw from electronic delivery after consenting and before the form is delivered. However, you can choose to make the withdrawal effective immediately or give yourself a little

breathing room by letting them know the withdrawal will take place a week after receipt, so that you have time to deal with last-minute withdrawals before the forms are due out.

Change in Hardware or Software Requirements

If a change in the method of electronic delivery is made, or the software or hardware requirements to access the form electronically change enough that there is a risk that the recipient wouldn't be able to access the form, advance notice of the change must be provided and a new consent, using the updated technology must be obtained.

Required Disclosures

When obtaining consent, there are a few items you must disclose to the participant, the list follows:

Paper Form

You must inform the recipient that the form will be furnished on paper if consent for electronic delivery is not provided.

Scope and duration of consent

You must inform the recipient when the consent will take effect, to what it applies and how long it will last. We believe it is best practice to keep the election in place until the participant terminates employment. After that generally delivery should revert back to a paper form.

Paper Form Choice

You must provide means of obtaining paper form, if requested, after consent is granted. This can be as simple as giving them an email or postal mail address to which they should send their request for a paper form. Or it can be a link to the survey or consent website where they can change their election.

Withdrawal of consent

The recipient must be told that:

- i. They can withdraw via writing (electronic or paper).
- ii. The company will confirm the withdrawal and the date on which it takes effect in writing (either electronically or on paper); and
- iii. Withdrawal of consent doesn't apply to forms furnished electronically before the date on which the withdrawal takes effect.

Notice of termination

The recipient must be informed of the conditions under which the consent will terminate (such as termination of employment).

Procedures to update recipient's information

You must tell the recipient how to provide updated contact information and also inform them of any change in the company's contact information.

Hardware and software requirements

You must provide a description of the hardware and software required to access, print, and retain the Form. However, this may be as simple as "a company computer" in many cases.

And now a shortcut on disclosures for those of you that have made it this far through the IRS requirements: a sample consent letter with all the required disclosures, created and used by an SOS client this year: [Download](#). Please do note that communications intended to comply with IRS regulations should generally be reviewed in detail by your legal department. In the next issue of Xtra, Part II will cover format, notice and access requirements, paper forms in the case of withdrawal of consent, and wrap everything up with an overview of the process from start to finish.

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The electronic version of the Form must contain all required information and comply with applicable revenue procedures (publication 1179 for 3921/3922) relating to substitute statements. You can do a mail merge that complies with the requirements to send an email - but it will generally be one email per "transaction" (exercise or purchase). Emails containing "composite" forms (with multiple transactions per form) are a little trickier but can be accomplished with MS Access or some commercially available software (SOS 6039 Xpress is a great example of one).

Notice

There are also requirements around notifying participants of the availability of the electronic form, and what you need to put in the subject line, etc.

Website - Notification / Email Subject line

If the form is available on a website, the company must notify the recipient that the form is available on the website. The notice may be delivered by mail, electronic mail, or in person. (Remember, you proved they could access the site while you were obtaining consent.) The notice must include information on how to access and print the form and must include "IMPORTANT TAX RETURN DOCUMENT AVAILABLE" (in caps). If the notice is emailed, the statement must be in the subject line of the email.

If you are distributing forms via a website, the easiest way to do this is, obviously, a mass email to ALL participants (whether they opted to receive forms electronically or not) once the forms are available. There is no rule that says you can't send EVERYONE the form electronically; you just have to make sure you also send a paper form to those that that did not consent to electronic delivery.

If you're sending the form in email, just make sure the subject link contains the required text. Easy, right?

Undeliverable electronic address

If an email bounces and the correct address can't be obtained, then the company must provide the form by mail or in person within 30 days after the bounce.

This can be as simple as checking an inbox a week after the original delivery and sending out paper forms to bounced emails at that time. Emails have a way of bouncing quickly if they're going to bounce.

Corrected Forms

If the company has corrected a Form that was sent electronically, the company must also send the corrected form in the same electronic manner. The corrected Form notice must be furnished by mail or in person if-

1. an email notice bounced and
2. the recipient has not provided a new e-mail address

Access Period

Forms must be available to the participant through October 15 of the year following the calendar year to which the Forms relate (or the first business day after October 15, if October 15 falls on a weekend or legal holiday).

Corrected Forms must be available for the same period or the date 90 days after the corrected forms are available, whichever is later.

Paper forms after withdrawal of consent

If a recipient withdraws consent to receive electronic forms and the withdrawal takes effect before the form is sent, a paper form must be provided. A paper form furnished after the form due date is timely if furnished within 30 days after the date the withdrawal of consent is received by the furnisher.

Overview of Process Start to finish:

So let's recap the process overall, is it really a lot of work? Or is it less work than you might think?

1. Send an email (with the required disclosures or a link to them) that has a link to a survey or a consent website to all participants - use the template provided (Download it [here](#)) as a starting point for the disclosures
2. Once a month send emails to new employees to ask them for consent.
3. Throughout the year, pester your participants into consenting - raffle prizes can also be a very effective motivator
4. In January, download consents (and withdrawals of consent) into your stock plan system so you'll know who will get paper and who will not
5. Send a confirmation of consent / withdrawal either weekly (as they come in) or once, at the end of the year. (In a perfect world your consent website will send this automatically, like the SOS consent website.)
6. In early to mid- January, either:
 - a. Post the forms to a website and send an email notifying participants that they are available
 - b. Send emails with the forms attached or embedded
 - c. Make sure the subject line of the email says "IMPORTANT TAX RETURN DOCUMENT AVAILABLE"
 - d. Check the email box from which the emails were sent for bounces
 - i. If you received any bounces, try to find a better (corporate only) email address for the participants, if you don't find one, add the participants to the "paper" list.
 - e. Send (or have your outsource provided send) paper forms to:
 - i. Terminated employees
 - ii. Bounced addresses
 - iii. Those who did not consent to electronic delivery

As you can see, electronic delivery really is possible, even without an extensive IT budget. And Oh So Green...

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