

Publications

IRS Proposes Making Remote Notarization Permanent for Retirement Plan Elections & Consents

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On December 30, the Department of Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) released a notice of proposed rules relating to the use of an electronic medium for retirement plan participant elections and spousal consents. 87 Fed. Reg. 80501 (Dec. 30, 2022). These proposed regulations were issued in response to the looming expiration date of the extended temporary relief provided in Notice 2022-27, which technically expired on December 31, 2022. The proposed amendments would provide an alternative to in-person witnessing of spousal consents required to be witnessed by a notary public or a plan representative, and clarifies that certain special rules for the use of an electronic medium for participant elections also apply to spousal consents. We provide background and commentary below.

A. Background

In response to the COVID-19 pandemic, Congress gave participants greater access to their retirement benefits via the CARES Act (Pub. L. 116-36). Specifically, Section 2202(a) of the CARES Act provided two key economic relief mechanisms for plan participants (if the plan sponsor chose to make them available) – coronavirus-related hardship distributions and a temporary expansion of plan loans. However, these relief provisions, along with existing plan distribution and loan provisions, are difficult to use when certain elections and waivers are required to be witnessed in person. For example, the qualified joint and survivor annuity (“QJSA”) provisions of section 417 of the Code generally require pension plans to obtain a spousal consent waiver as a part of a request for a plan distribution or loan. Spousal consent to a QJSA waiver generally must be witnessed in the physical presence of either a plan representative or a notary public under Treasury Regulation section 1.401(a)-21(d)(6). Moreover, spousal consent is required for a married participant in a 401(k) or ERISA-covered 403(b) plan to designate a beneficiary other than their spouse, and such beneficiary designations are subject to the same witnessing requirements. During the pandemic,

these witnessing requirements became difficult to satisfy in light of social distancing measures and stay-at-home practices, and continue to be a challenge as we move towards our new normal with increased remote work.

IRS and Treasury initially provided temporary relief in Notice 2020-42, which provided relief for the 2020 calendar year from the physical presence requirement under section 1.401(a)-21(d)(6) for any participant election witnessed by a notary public of a state that permits remote electronic notarization or any participant election (or consent) witnessed by a plan representative if certain requirements are met. Thereafter, Notices 2021-3 and 2021-40 extended that same relief through June 30, and December 31, 2021, respectively, and Notice 2022-27 extended through 2022. Now, IRS and Treasury have published proposed rules in response to comments from stakeholders that would amend section 1.401(a)-21(d)(6) to make the relief permanent, and are requesting comments by March 30.

B. Brief Summary of Stakeholder Comments

Numerous stakeholders who requested an extension of the temporary relief further requested that the relief be made permanent. Section 1.401(a)-21(d)(6)(iii) provides that the Commissioner may provide in published guidance that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement, but only if those procedures with respect to the electronic system provide the same safeguards for participant elections as are provided through the physical presence requirement.

Commenters Supporting Remote Witnessing – Commenters in favor of adding remote witnessing as a permanent alternative to the physical presence requirement argued that the remote witnessing process – particularly remote witnessing by a notary public – is easy to use, reduces the time it takes to process a distribution, and saves participants and beneficiaries both time and money. In response to concerns about potential fraud, supporters of remote witnessing argued that State notarization laws allowing remote witnessing have strict guidelines, including knowledge-based authentication and credential analysis. Finally, supporters also noted that during the period of remote witnessing permitted by the temporary relief notices, plans had not reported any evidence of fraud, spousal coercion or abuse. This led many commenters to conclude that the safeguards provided by the temporary relief notices were adequate.

Commenters Opposing Remote Witnessing – Commenters opposing remote witnessing for spousal consents made several arguments for retaining the physical presence requirement. The primary argument was that we are no longer in a public health emergency, which was the reason for the initial relief provided and subsequent extensions. Additionally, in response to commenters who have used the absence of fraud during the period as evidence of the safety of remote witnessing, commenters in opposition argued that it usually takes many years for evidence of fraud to surface, and further, that investigating and resolving allegations of fraud can take many years. Finally, opponents argue that IDs cannot be effectively inspected during remote witnessing, and the scope of a webcam is too small to see the entire room, e.g. there could be someone else in the room exerting undue influence outside of the camera's line of sight. At the very least, commenters in opposition want the scope of the current safeguards provided in 1.401(a)-21(d) to be clarified.

C. The Proposed Regulation

The proposed regulation modifies the participant election rules in 1.401(a)-21(d) in two important ways. First, the proposed regulation sets forth alternatives to the physical presence requirement in 1.401(a)-21(d)(6) for the witnessing of spousal consent. Second, the proposed regulation clarifies that the protections in 1.401(a)-21(d) that apply to participant elections made using an electronic medium also apply to spousal consents made using an electronic medium. The proposed regulation also makes other minor conforming changes.

The requirements to use the remote witnessing alternative in the proposed regulation are substantially the same as the requirements for accessing relief set forth in Notice 2021-3:

Notary Rules – Where a participant election is witnessed by a *notary*, physical presence is deemed satisfied for an electronic system that uses remote notarization if executed via live audio-video (AV) technology that otherwise satisfies the requirements for participant elections under section 1.401(a)-21(d)(6), and is consistent with state law requirements that apply to the notary public. The proposed regulation clarifies that elections witnessed in person before a notary must continue to be accepted.

Plan Representative Rules – Where a participant election is witnessed by a *plan representative*, the physical presence requirement is deemed satisfied for an electronic system using live AV technology if:

- the individual signing the election presents a valid photo ID to the plan representative during the live AV conference, and may not merely transmit a copy of the photo ID prior to or after the witnessing;

- the live AV conference allows for direct interaction between the signing individual and the plan representative (for example, a pre-recorded video of the person signing is not sufficient);
- the signing individual transmits by fax or email a legible copy of the signed document to the plan representative the same day it was signed;
- the plan representative acknowledges the signature has been witnessed in accordance with the Notice and transmits the signed document, including the acknowledgment, back to the individual under a system that satisfies the applicable notice requirements under section 1.401(a)-21(c) (“effective ability to access” rules); and
- A recording of the AV conference must be made and retained in accordance with general record retention rules (Code sec. 6001).

D. Effective Date/Reliance

The proposed rules would be effective six months after publication as a final rule. However, taxpayers generally may rely on them in the meantime. As a result, the “temporary relief” may effectively continue to be relied upon.