

MEMO# 33010

December 28, 2020

IRS Temporarily Extends Remote Notarization Guidance Due to Ongoing Pandemic

[33010]

December 28, 2020 TO: ICI Members
Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: IRS Temporarily Extends Remote Notarization Guidance Due to Ongoing Pandemic

In Notice 2021-03,[\[1\]](#) the Internal Revenue Service (IRS) announced an extension of the temporary relief from the physical presence requirement for notarization of spousal consent (and other participant elections) previously provided in Notice 2020-42.[\[2\]](#) Notice 2020-42 provided temporary relief from the physical presence requirement in Treasury Regulation § 1.401(a)-21(d)(6)[\[3\]](#) for participant elections required to be witnessed by a plan representative or a notary public, including a spousal consent. Necessitated by the COVID-19 pandemic, the original temporary relief covered the time period from January 1, 2020, through December 31, 2020. **Notice 2021-03 extends the relief for the period of January 1, 2021, through June 30, 2021.**[\[4\]](#)

Conditions for Relief

The extended relief in Notice 2021-03 is subject to the same conditions described in Notice 2020-42. The conditions include:

- For notarization of a participant election, during the time-period of relief, the physical presence requirement is deemed satisfied for an electronic system that uses remote notarization if executed via live audio-video technology that otherwise satisfies the requirements of participant elections under § 1.401(a)-21(d)(6) and is consistent with state law requirements that apply to the notary public.[\[5\]](#)
- For a participant election witnessed by a plan representative, during the time-period of relief, the physical presence requirement is deemed satisfied for an electronic system if the electronic system using live audio-video technology satisfies the following requirements:
 1. The individual signing the participant election must present a valid photo ID to the plan representative during the live audio-video conference, and may not merely transmit a copy of the photo ID prior to or after the witnessing;
 2. The live audio-video conference must allow for direct interaction between the

- individual and the plan representative (for example, a pre-recorded video of the person signing is not sufficient);
3. The individual must transmit by fax or electronic means a legible copy of the signed document directly to the plan representative on the same date it was signed; and
 4. After receiving the signed document, the plan representative must acknowledge that the signature has been witnessed by the plan representative in accordance with the requirements of Notice 2021-03 and transmit the signed document, including the acknowledgement, back to the individual under a system that satisfies the applicable notice requirements under § 1.401(a)-21(c) (regarding the effective ability to access the electronic medium and right to a free paper copy upon request).

Request for Comment

Notice 2021-03 invites public comment relating to the temporary relief from the physical presence requirement, particularly with respect to whether the relief should be made permanent and, if so, what, if any, procedural safeguards are necessary to reduce the risk of fraud, spousal coercion, or other abuse in the absence of a physical presence requirement. The Notice indicates that any permanent modification of the physical presence requirement in § 1.401(a)-21(d)(6)(i) would be made through the regulatory process, subject to notice and comment (*i.e.*, there would be an additional opportunity to comment on a regulatory proposal).

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endnotes

[1] Notice 2021-03 is available here: <https://www.irs.gov/pub/irs-drop/n-21-03.pdf>.

[2] See ICI Memorandum No. 32507, dated June 3, 2020, *available at* https://www.ici.org/my_ici/memorandum/memo32507.

[3] Section 1.401(a)-21(d)(6)(i) provides that, in the case of a participant election that is required to be witnessed by a plan representative or a notary public (such as a spousal consent required under § 417), the signature of the individual making the participant election must be witnessed in the physical presence of a plan representative or a notary public. Section 1.401(a)-21(d)(6)(iii) provides that the Commissioner may provide in 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.

[4] In October 2020, ICI joined with several other organizations urging the IRS to make permanent the temporary relief from the physical presence requirement provided in Notice 2020-42, or, at a minimum, to extend the relief for an additional year. See ICI Memorandum No. 32801, dated October 2, 2020, *available at* https://www.ici.org/my_ici/memorandum/memo32801.

[5] The state must permit remote electronic notarization for the relief to apply.

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