

MEMO# 33621

June 25, 2021

IRS Further Extends Temporary Remote Notarization Guidance Due to Ongoing Pandemic

[33621]

June 25, 2021 TO: ICI Members
Pension Committee

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

In Notice 2021-40,[\[1\]](#) the Internal Revenue Service (IRS) announced further extension of the temporary relief from the physical presence requirement for notarization of spousal consent (and other participant elections) previously provided in Notices 2021-03 and 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 extended the relief for the period from January 1, 2021, through June 30, 2021.[\[4\]](#) **Notice 2021-40 now extends the relief for the period from July 1, 2021, through June 30, 2022, and extends all the conditions to qualify for that relief (as described below).**

Conditions for Relief

The extended relief in Notice 2021-40 is subject to the same conditions described in Notices 2020-42 and 2021-03. 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 Treas. Reg. § 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:
 - a. 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;
- b. 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);
 - c. 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
 - d. 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 2021-40 requests comments by September 30, 2021 on whether permanent guidance should modify the physical presence requirement. More specifically, requested comments include:

1. How the temporary removal of the physical presence requirement for participant elections required to be witnessed by a plan representative or a notary public has affected costs and burdens for all parties (for example, participants, spouses, and plans) and whether there are costs and burdens associated with the physical presence requirement that support modifying the requirement on a permanent basis;
2. Whether there is evidence that the temporary removal of the physical presence requirement has resulted in fraud, spousal coercion, or other abuse, and how, if the physical presence requirement is permanently modified, increased fraud, spousal coercion, or other abuse may be likely to result from that modification;
3. How participant elections are being witnessed, or are expected to be witnessed, as the COVID-19 pandemic abates (for example, whether the availability of in-person notarization has returned, or is expected to return, to pre-COVID-19 pandemic levels);
4. If guidance permanently modifying the physical presence requirement is issued, what procedures should be established to provide the same safeguards for participant elections as are provided through the physical presence requirement; and
5. If guidance permanently modifying the physical presence requirement is issued, whether the guidance should establish procedures for witnessing by plan representatives that are different from procedures for witnessing by notaries.

The Notice indicates that, after reviewing comments, the Treasury Department and IRS will determine whether to propose modifications to the physical presence requirement in Treas. Reg. § 1.401(a)-(21)(d)(6) (in which case, there will be an additional opportunity for public comment), or instead to announce that the current physical presence requirement will be retained without modification.

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endnotes

[1] Notice 2021-40 is available here: <https://www.irs.gov/pub/irs-drop/n-21-40.pdf>.

[2] See ICI Memorandum No. 33010, dated December 28, 2020, *available at* <https://www.ici.org/memo33010>; and ICI Memorandum No. 32507, dated June 3, 2020, *available at* <https://www.ici.org/memo32507>.

[3] Treas. Reg. § 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 and April 2021, ICI joined with several other organizations urging the IRS to make permanent the temporary relief from the physical presence requirement, 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/memo32801>; and ICI Memorandum No. 33560, dated June 1, 2021, *available at* <https://www.ici.org/memo33560>.

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