

MEMO# 33806

October 7, 2021

ICI Requests Permanence of IRS Remote Notarization Guidance

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: ICI Requests Permanence of IRS Remote Notarization Guidance

In the attached letter, ICI joined several other trade organizations in requesting that the Internal Revenue Service (IRS) make permanent the remote notarization relief most recently provided in Notice 2021-40.[\[1\]](#) In that Notice, the IRS announced further extension of the temporary relief from the physical presence requirement[\[2\]](#) for notarization of spousal consent (and other participant elections) previously provided in Notices 2021-03 and 2020-42.[\[3\]](#) Notice 2021-40 also requested comments by September 30, 2021 on whether permanent guidance should modify the physical presence requirement.

The letter explains that remote witnessing has worked well during the pandemic and has allowed retirement plan participants to access their benefits, without unnecessarily jeopardizing their health by physically meeting with a notary public or plan representative. It further describes the benefits of remote witnessing through added security measures (such as the ability to record meetings and use of multi-factor authentication) and convenience in changing work environments.

The letter concludes that the conditions for making use of remote witnessing outlined in the prior guidance[\[4\]](#) provide strong safeguards and that no additional measures are necessary if relief from the physical presence requirement is made permanent. The letter also provides support for making the relief permanent without a formal regulatory amendment.

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endnotes

[1] See ICI Memorandum No. 33621, dated June 25, 2021, *available at* <https://www.ici.org/memo33621>. 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>.

[2] 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.

[3] Notice 2020-42 provided temporary relief from the physical presence requirement in Treas. Reg. § 1.401(a)-21(d)(6) 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. Notice 2021-40 extended the relief for the period from July 1, 2021, through June 30, 2022, and extends all the conditions to qualify for that relief. 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>.

[4] The prior Notices require an electronic system using live audio-video technology that satisfies specific conditions for remote notarization of participant elections, including consistency with state law notary requirements, and plan representative witnessing of participant elections. See ICI Memorandum No. 33621, dated June 25, 2021, *available at* <https://www.ici.org/memo33621>.