

**MEMO# 34147**

May 18, 2022

# IRS Further Extends Temporary Remote Notarization Guidance Due to Ongoing Pandemic

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TO: ICI Members

Pension Committee

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

In Notice 2022-27,[\[1\]](#) 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 2021-40, 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 extended the relief for the period from July 1, 2021, through June 30, 2022.[\[5\]](#) Notice 2022-27 now extends the relief for the period from July 1, 2022, through December 31, 2022, and extends all the conditions to qualify for that relief (as described below).

## Conditions for Relief

The extended relief in Notice 2022-27 is subject to the same conditions described in Notices 2020-42, 2021-03, and 2021-40. 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.[\[6\]](#)
- 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:

- 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;
- 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);
- 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
- 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).

## **Prospects for Further Extension or Permanence**

The Notice indicates that, in light of recent easing of public health precautions relating to the COVID-19 pandemic, a further extension of temporary relief from the physical presence requirement beyond the end of 2022 is not expected to be necessary.

On the other hand, the Notice indicates that the Treasury Department and IRS are continuing to review stakeholder comments about whether to retain the physical presence requirement in Treas. Reg. § 1.401(a)-21(d)(6) without modification or to propose modifications to the physical presence requirement. If the agencies decide to propose modifications, they will do so only through the regulatory process, which will include the opportunity for further comment.

Elena Barone Chism  
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### **endnotes**

[1] Notice 2022-27 is available here: <https://www.irs.gov/pub/irs-drop/n-22-27.pdf>.

[2] See ICI Memorandum No. 33621, dated June 25, 2021, available at <https://www.ici.org/memo33621>; 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] Notice 2021-40 also requested comments on whether permanent guidance should modify the physical presence requirement. In a September 30, 2021 letter, ICI joined several other trade organizations in requesting that the IRS make permanent the remote notarization relief. See ICI Memorandum No. 33806, dated October 7, 2021, available at <https://www.ici.org/memo33806>.

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