

MEMO# 34806

January 13, 2023

IRS Issues Proposal for Permanent Remote Notarization and Witnessing of Spousal Consent

[34806]

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension

Tax RE: IRS Issues Proposal for Permanent Remote Notarization and Witnessing of Spousal Consent

The Internal Revenue Service (IRS) issued a proposed regulation that would provide permanent relief from the physical presence requirement for spousal consents required to be witnessed by a plan representative or a notary public.[\[1\]](#) The proposal includes conditions very similar to the temporary relief from the physical presence requirement previously granted in Notice 2022-27 and earlier related guidance.[\[2\]](#) That temporary relief under Notice 2022-27 expired on December 31, 2022. As a reminder, the ICI has joined numerous joint trade letters urging the IRS to extend or make permanent the temporary relief.[\[3\]](#) Fortunately, the IRS will permit reliance on the proposed regulation prior to issuance of final regulations.

The proposed regulation provides two alternatives to the physical presence requirement for spousal consents, depending on whether the witnessing is by a notary public or a plan representative. Under the proposal:

- A plan may accept a spousal consent witnessed remotely by a notary public, provided that (1) the signature of the person signing the spousal consent is witnessed by the notary public using live audio-video technology, (2) the requirements in Treasury Reg. §1.401(a)-21(d) for spousal consents are satisfied, and (3) the remote witnessing is consistent with state law requirements that apply to the notary public. These conditions are substantially similar to the temporary relief from the physical presence requirement provided in the earlier guidance. The proposal includes a new requirement that a plan that accepts spousal consents witnessed remotely by a notary public, must also accept spousal consents witnessed in the physical presence of a notary public.
- A plan may accept a spousal consent witnessed remotely by a plan representative,

provided that (1) the signature of the person signing the spousal consent is witnessed by a plan representative using live audio-video technology, (2) the requirements in Treasury Reg. §1.401(a)-21(d) for spousal consents are satisfied, and (3) the remote witnessing satisfies the following five requirements (the last of which is new and was not included in the previous temporary relief):

- The individual signing the spousal consent 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 electronic means a legible copy of the signed document directly to the plan representative on the same date it was signed;
- After receiving the signed document, the plan representative must acknowledge that the signature has been witnessed by the plan representative and transmit the signed document, including the acknowledgement, back to the individual who signed the consent, under a system that satisfies the applicable notice requirements under Treasury Reg. § 1.401(a)-21(c) (regarding the effective ability to access the electronic medium and right to a free paper copy upon request); and
- A recording of the audio-video conference during which the spousal consent was signed remotely must be made by the plan representative and must be retained by the plan in accordance with Internal Revenue Code section 6001 (which provides rules relating to the maintenance of records, statements, and special returns).

The proposed regulation also confirms and emphasizes that the five special rules regarding use of an electronic medium for participant elections in existing Treasury Reg. §1.401(a)-21(d) (e.g., effective ability to access, authentication, etc.) apply to spousal consents, including a few clarifications in that regard.

The regulation is proposed to apply beginning on the date that is six months after publication of the final regulation in the Federal Register. Importantly, the proposal specifies that prior to the applicability date of the final regulation, taxpayers may rely on the rules set forth in the proposal. This effectively extends the relief under Notice 2022-27 that was set to expire on December 31, 2022, though the proposal contains slightly different conditions as described above.

Comments on the proposal are due by March 30, 2023.

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Notes

[1] The proposal was published at 87 Fed. Reg. 80501 and is available at <https://www.govinfo.gov/content/pkg/FR-2022-12-30/pdf/2022-28327.pdf>.

[2] For a summary of Notice 2022-27, see ICI Memorandum No. 34147, dated May 18, 2022,

available at <https://www.ici.org/memo34147>.

[3] In October 2020, April 2021, and November 2022, 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 e.g., 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>.

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