

September 30, 2021

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2021-40)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Permanent Relief for Remote Witnessing Procedures

In response to the request for comments included in Notice 2021-40, the undersigned organizations write to reiterate our request for the Internal Revenue Service (“Service”) to make permanent its temporary relief from the physical presence requirement for spousal consents, as originally announced in Notice 2020-42 and extended by Notice 2021-03 and Notice 2021-40. The undersigned organizations appreciate the relief and extensions the Service previously announced due to the pandemic. We believe, however, that permanent relief is warranted, even as the pandemic abates. We believe further that it should be made available *without* the need for a formal rulemaking process.

Permanent Relief Is Warranted Based on Additional Security and Convenience

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. These personal and public health benefits, however, have not been the only benefits of using remote witnessing. Specifically, remote witnessing has proven, under the Service’s temporary relief, to be more secure and more convenient than physical witnessing.

Security. Remote witnessing creates a more secure environment for spousal consents than physical witnessing. Just like physical witnessing, remote witnessing provides real-time third-party identity verification by visually comparing a person’s face with a valid photo ID indicating that the person is who they claim to be. However, unlike most physical witnessing, remote witnessing can also easily be recorded and create an electronic audit trail. Additionally, in the case of plans that use a remote online notarization service, plan sponsors can utilize additional levels of fraud prevention that cannot be incorporated into a physical witnessing process. For example, remote online notarization services generally use multi-factor authentication through two forms of identity proofing, including knowledge-based authentication and credential analysis. This provides additional protection for spouses for whom the plan may not have an existing relationship. Under these circumstances, not only is remote witnessing as secure as physical witnessing, it is more secure because of these additional layers of protection.

Notice 2021-40 requests comments on “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.” We now have over a

year of experience with remote witnessing. Since the Service first announced its temporary relief from the physical presence requirement, retirement plan service providers have relied on remote online notarizations tens of thousands of times. Notwithstanding this significant volume, we are not aware of any confirmed instances or patterned attempts at fraud related to these remote online notarizations.

We understand that certain groups have asserted to the Service that relief from the physical presence requirement will result in an increase in fraud or abuse. Such commenters should provide concrete *evidence*, rather than unsupported speculations or anecdotal reporting, that such fraud or abuse has increased and that the physical presence requirement would have prevented it. The undersigned's members have *actual experience* with tens of thousands of spousal consents conducted via remote witnessing since the beginning of the pandemic. They can confirm that they see no evidence of increased fraud or abuse, or increased risk of fraud or abuse.

Convenience. Notice 2021-40 requests comments on how the temporary removal of the physical presence requirement has affected the burdens associated with the physical presence requirement. Remote witnessing is undoubtedly a less burdensome and more convenient alternative to physical witnessing for those participants who are comfortable using face-to-face online video communications tools. Companies that have made remote witnessing available during the pandemic have consistently found that their customers appreciate the additional convenience. Moreover, companies incorporating remote witnessing have found that it offers a quick and secure alternative to conventional physical witnessing. According to one company who has adopted remote online notarization for spousal consents, the average remote notary session takes less than eight minutes from start to finish.

As plan administration has increasingly harnessed electronic technologies, retirement plan sponsors and their service providers have been able to deliver a convenient and seamless user experience. Remote witnessing is another step forward in that regard. This does not mean that electing benefits or changing beneficiaries is or should be a “one-click” process. The spousal consent process ensures deliberation and remote witnessing still has built-in safeguards similar to physical witnessing. The Service should support those innovations that improve the efficiency and experience of delivering benefits with appropriate safeguards.

Notice 2021-40 requests comments on the use of remote witnessing as the pandemic recedes. The undersigned organizations believe that, as the pandemic abates and the public health benefits of remote witnessing subside, the increased convenience of remote witnessing is still beneficial in many contexts. For example, when plan participants request distributions following natural disasters or medical emergencies, remote witnessing offers a secure and convenient option for these participants who may find it difficult to physically travel. Remote witnessing also is beneficial to both participants and/or spouses who may have physical limitations and those living in more remote areas.

Because the Service's current relief is only temporary, some plans and service providers have been reluctant to fully integrate remote witnessing into their systems. Permanent relief would allow these plans and providers to build permanent and integrated systems that meet their plan sponsor and participant expectations – *i.e.*, through a fully electronic and virtual environment,

without the need for physical witnessing. This type of permanent integration would only help to improve the participant experience by making it more convenient and seamless.

Changing Nature of Work. The pandemic has made clear that the nature of work is changing, and increasingly employees will work from home or in another location that is not near a plan representative. This is consistent with a continuing trend in electronic administration and recordkeeping of retirement plans. The Service itself went remote during the pandemic, and it was able to fulfill its mission without the need to be in person. Updating the rules for witnessing spousal consent to reflect the changing nature of employment – with appropriate safeguards – fulfills Congress’ direction more than 20 years ago that “a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.”¹

Commissioner Support for Remote Witnessing. Not only have retirement plan sponsors and service providers recognized the additional security and convenience created by remote witnessing procedures, these benefits have also been acknowledged and supported by the current Commissioner of Internal Revenue. During a March 18, 2021 House Ways and Means Committee hearing, the Commissioner of Internal Revenue, Charles Rettig, expressed his strong support for the permanent extension of the Service’s remote witnessing rules. Specifically, when asked about the use of remote online notarization during the pandemic, Commissioner Rettig said that he was a “huge advocate” for making these rules permanent and expressed his belief that remote online notarization is a service that taxpayers “deserve.”² Commissioner Rettig also stated that he was not aware of any issues that would cause the Service to not make its relief permanent.

Additional Protections

Notice 2021-40 asks for comments regarding “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.” For the reasons cited above, the procedures described in Notice 2020-42 clearly safeguard participant elections that are performed remotely. There is no need to establish additional procedures. Nevertheless, because some participants might not be comfortable using remote witnessing technologies, we do not think that a plan administrator should be able to *require* that a spouse’s consent be witnessed electronically. Instead, as is the case under the Service’s temporary relief, remote witnessing should merely be one option available to plans and participants.

The Service Should Honor State Notarial Standards

The undersigned organizations believe that the Service should make its remote witnessing rules permanently available in alignment with state notarial standards. That is, to the extent that a state’s notarial rules allow for remote online notarizations, the Service should recognize those

¹ Electronic Signatures in Global and National Commerce Act § 101(a)(1).

² March 18, 2021 Oversight Subcommittee Hearing with the IRS Commissioner on the 2021 Filing Season.

standards as satisfying any notarial standards required by the Internal Revenue Code or any regulations thereunder.

As of this writing, 38 states have enacted permanent remote online notarization rules and additional states are actively considering similar measures. The pandemic has accelerated the nationwide trend to recognize and affirm the appropriateness and effectiveness of remote online notarizations. We are not asking the Service to require any state to adopt particular standards. We only ask that the Service acknowledge these state-level standards and permit the use of remote online notarization in any case in which a notarization would be recognized as valid under applicable state law.

Permanent Relief Does Not Require Regulatory Amendments

Notice 2021-40 states that, following a review of the public comments on this issue, the Service “will determine whether to propose modifications to the physical presence requirement in § 1.401(a)-(21)(d)(6) as part of the regulatory process that will include the opportunity for further comment, or instead to issue an announcement that the physical presence requirement currently in § 1.401(a)-(21)(d)(6) will be retained without modification.” The undersigned organizations agree that any amendment to the relevant regulations will require a notice and comment rulemaking, with an opportunity for future public comment. We do not, however, believe that such a process is required to provide the permanent relief that we are requesting.

The applicable Treasury regulations expressly authorize the Service to make available permanent relief from the physical presence requirement, *without* notice and comment rulemaking, if the Commissioner publishes guidance in the Internal Revenue Bulletin describing procedures that are deemed to satisfy the physical presence requirement, provided that those procedures provide the “same safeguards for participant elections as are provided through the physical presence requirement.” Treas. Reg. § 1.401(a)-21(d)(6)(iii). As discussed above, not only does the Service’s temporary relief for remote witnessing provide the same safeguards as physical witnessing, but because of the availability of electronic recording, electronic audit trails, and additional authentication methods, remote witnessing offers procedures that are more protective than conventional physical witnessing.

Based on the authority provided to the Commissioner through Treas. Reg. § 1.401(a)-21(d)(6)(iii), the Service should announce a permanent extension of its remote witnessing rules by publishing such guidance in the Internal Revenue Bulletin. We presume that the Service believed that it could initially announce its temporary relief in reliance on this noted authority. In reliance on that same authority, it should announce a permanent extension of its temporary relief. If the Service believes that, as part of a regulatory amendment, additional requirements may be appropriate for remote witnessing, we believe it would be appropriate to consider those additional conditions as part of a notice and comment rulemaking. **In the meantime, however, the Service should not permit its current relief to expire.**

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Thank you for your consideration. Please do not hesitate to contact any of the undersigned organizations if you have any questions.

Sincerely,

American Bankers Association
American Benefits Council
American Council of Life Insurers
American Financial Services Association
American Retirement Association
Committee of Annuity Insurers
The ERISA Industry Committee
Financial Services Institute
Finseca
Insured Retirement Institute
Investment Company Institute
National Association of Insurance and Financial Advisors
Retirement Industry Trust Association
Securities Industry and Financial Markets Association
The SPARK Institute
U.S. Chamber of Commerce

Enclosure

- April 19, 2021 Letter Requesting Permanent Relief
- October 1, 2020 Letter Requesting Permanent Relief

cc:

- Sunita Lough, Commissioner of Tax Exempt and Governmental Entities
- Carol Weiser, Benefits Tax Counsel
- Rachel Levy, Associate Chief Counsel
- Pamela Kinard, Office of the Associate Chief Counsel

April 19, 2021

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2021-03)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Permanent Relief for Remote Witnessing Procedures

In response to the request for comments included in Notice 2021-03, the undersigned organizations write to reiterate our request for the Internal Revenue Service (“Service”) to make permanent its temporary relief from the physical presence requirement for spousal consents, as originally announced in Notice 2020-42 and extended by Notice 2021-03. **We were extremely pleased to see Commissioner Charles Rettig express his strong support for this in his testimony during the March 18, 2021 hearing of the House Ways and Means Committee.**

Last fall, through our enclosed letter dated October 1, 2020, the undersigned organizations urged the Service to make permanent its temporary remote witnessing rules for spousal consents or, at a minimum, extend that relief through the end of the pandemic. The undersigned organizations very much appreciate the six-month extension already announced by the Service through Notice 2021-03.

Nevertheless, the Service’s temporary relief is set to expire on June 30, 2021, notwithstanding the fact that it has made the spousal consent process more secure and more convenient for interested stakeholders. Based on these demonstrated benefits, the Service should make its remote witnessing rules permanent and, without delay, announce a permanent extension of the relief described in Notice 2020-42 and Notice 2021-03. If the Service believes that, as part of a regulatory amendment, additional requirements may be appropriate for remote witnessing, we believe it would be appropriate to consider those additional conditions as part of a notice and comment rulemaking. In the meantime, however, the Service should not permit its current relief to expire.

Permanent Relief Is Warranted Based on Additional Security and Convenience

Remote witnessing has worked well during the pandemic and allowed retirement plan participants to access their benefits without unnecessarily jeopardizing their health by physically meeting with a notary public or plan representative. These personal and public health benefits, however, have not been the only benefits resulting from the use of remote witnessing. Specifically, remote witnessing has proven, under the Service’s temporary relief, to be more secure and more convenient than physical witnessing.

Security. Remote witnessing creates a more secure environment for spousal consents than physical witnessing. Just like physical witnessing, remote witnessing provides real-time third-

party identity verification by visually comparing a person's face with a valid photo ID indicating that the person is who they claim to be. However, unlike most physical witnessing, remote witnessing can also easily be recorded and create an electronic audit trail. Additionally, in the case of plans that use a remote online notarization service, plan sponsors can incorporate dynamic knowledge-based-authentication standards that cannot be easily incorporated into a physical witnessing process. Under these circumstances, not only is remote witnessing as secure as physical witnessing, it is more secure because of these additional layers of protection. For example, one large plan service provider reported that, over the past year, its clients have used remote notarization over 7,000 times. Another large provider reported they had just about reached 7,000 remote notarizations through the end of March. These providers are aware of *no* incidents of fraud.

Convenience. Remote witnessing is also undoubtedly a more convenient alternative to physical witnessing for those participants who are comfortable using face-to-face online video communications tools. Companies that have made remote witnessing available during the pandemic have consistently found that their customers appreciate the additional convenience made possible through remote witnessing options. Moreover, companies incorporating remote witnessing have found that it offers a quick and secure alternative to conventional physical witnessing. According to one company who has adopted remote notarization for spousal consents, the average remote notary session takes less than eight minutes from start to finish.

Commissioner Support for Remote Witnessing. Not only have retirement plan sponsors and service providers recognized the additional security and convenience created by remote witnessing procedures, these benefits have also been acknowledged and supported by the current Commissioner of Internal Revenue. During a March 18, 2021 hearing of the House Ways and Means Committee, the Commissioner of Internal Revenue, Charles Rettig, expressed his strong support for the permanent extension of the Service's remote witnessing rules. Specifically, when asked about the use of remote online notarization during the pandemic, Commissioner Rettig said that he was a "huge advocate" for making these rules permanent and expressed his belief that remote notarization is a service that taxpayers "deserve." Commissioner Rettig also stated that he was not aware of any issues that would cause the Service to not make its relief permanent.

The Service Should Honor State Notarial Standards

The undersigned organizations believe that the Service should make its remote witnessing rules permanently available in alignment with state notarial standards. That is, to the extent that a state's notarial rules allow for remote online notarizations, the Service should recognize those standards as satisfying any notarial standards required by the Internal Revenue Code or any regulations thereunder.

As of this writing, 31 states have enacted permanent remote notarization rules and additional states are actively considering similar measures. This nationwide trend, which appropriately recognizes the appropriateness and effectiveness of remote online notarizations, has only accelerated because of the ongoing pandemic. Therefore, upsetting all of these rules at this time would create unnecessary chaos. We are not asking the Service to require any state to adopt

particular standards, only that the Service not disregard these state-level standards and permit the use of remote notarization in any case in which a notarization would be recognized as valid under applicable state law.

Permanent Relief Does Not Require Regulatory Amendments

Notice 2021-03 states that “Any permanent modification of the physical presence requirement in § 1.401(a)-21(d)(6)(i) would be made through the regulatory process that is subject to notice and comment.” The undersigned organizations agree that any amendment to the relevant regulations will require a notice and comment rulemaking. We do not, however, believe that such a process is required to provide the permanent relief that we are requesting.

The applicable Treasury regulations permit the Service to make available permanent relief from the physical presence requirement, without notice and comment rulemaking, if the Commissioner publishes guidance in the Internal Revenue Bulletin describing procedures that are deemed to satisfy the physical presence requirement, provided that those procedures provide the “same safeguards for participant elections as are provided through the physical presence requirement.” Treas. Reg. § 1.401(a)-21(d)(6)(iii). As discussed above, not only do the remote witnessing procedures discussed in Notice 2020-42 and Notice 2021-03 provide the same safeguards as physical witnessing, because of electronic recording, electronic audit trails, and additional authentication methods, in many ways, remote witnessing offers procedures that are more protective than conventional physical witnessing.

Based on the authority provided to the Commissioner through Treas. Reg. § 1.401(a)-21(d)(6)(iii), the Service should announce a permanent extension of the remote witnessing rules described in Notice 2020-42 and Notice 2021-03 by publishing such guidance in the Internal Revenue Bulletin. We presume that the Service believed that it could initially announce its temporary relief in reliance on this noted authority and, in reliance on that same authority, it should announce a permanent extension of its temporary relief. If the Service believes that, as part of a regulatory amendment, additional requirements may be appropriate for remote witnessing, we believe it would be appropriate to consider those additional conditions as part of a notice and comment rulemaking. **In the meantime, however, the Service should not permit its current relief to expire.**

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Thank you for your consideration. Please do not hesitate to contact any of the undersigned organizations if you have any questions.

- American Bankers Association
- American Benefits Council
- American Council of Life Insurers
- American Financial Services Association
- American Retirement Association
- Committee of Annuity Insurers
- The ERISA Industry Committee

Financial Services Institute
Finseca
Insured Retirement Institute
Investment Company Institute
National Association of Insurance and Financial Advisors
Retirement Industry Trust Association
Securities Industry and Financial Markets Association
Small Business Council of America
The SPARK Institute
U.S. Chamber of Commerce

Enclosure

- October 1, 2020 Letter Requesting Permanent Relief

Cc:

- Sunita Lough, Commissioner of Tax Exempt and Governmental Entities
- Carol Weiser, Benefits Tax Counsel
- Rachel Levy, Associate Chief Counsel
- Stephen Tackney, Deputy Associate Chief Counsel
- Pamela Kinard, Office of the Associate Chief Counsel

October 1, 2020

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RE: Notice 2020-42, Remote Notarization

The undersigned organizations write to request that the Internal Revenue Service (“Service”) make permanent the temporary relief from the physical presence requirement for spousal consent in Notice 2020-42.

The Internal Revenue Code (“Code”) requires retirement plans to obtain spousal consent for certain distributions and beneficiary elections, which must be witnessed by a notary or plan representative. Treasury regulations allow the Service to provide in guidance that electronic systems satisfy the physical presence requirement, if those systems provide the same safeguards as witnessing spousal consent in person. In Notice 2020-42, the Service provided relief for any participant election witnessed by a notary public of a state that permits remote electronic notarization, or witnessed by a plan representative electronically meeting certain requirements. The relief is temporary, however, and is due to end on December 31, 2020.

Notice 2020-42 is an example of the government’s rapid and flexible response to the COVID-19 pandemic and was welcomed by the retirement plan community. To protect participants (especially at-risk retirees), many plan sponsors and their service providers implemented remote notarization quickly after the relief was provided. Remote notarization has proven successful, is popular with participants, and is quickly gaining broad acceptance in states. Accordingly, we believe it is appropriate to make the guidance in Notice 2020-42 permanent.

Remote notarization fully protects participants and their spouses. Remote notarization is now available in almost all states, for a variety of situations in which notarization is needed. Using video technology, states impose protections to ensure that an individual is who they say they are and that the document is being signed contemporaneously. E-notarization “in person” supported by audio and visual technology provides strong consumer safeguards.

For spousal consent witnessed by a plan representative, Notice 2020-42 imposes similar safeguards. The following requirements all must be met:

- 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.
- 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 this notice and transmit the signed document, including the acknowledgement, back to the individual under a system that satisfies the applicable notice requirements under Treas. Reg. § 1.401(a)-21(c).

No system can ever completely eliminate fraud, but the use of state-approved remote notarization or the safeguards mentioned above for plan representatives provide at least as robust protection as in-person signatures. We are aware of no evidence that remote notarization has led to an increase in fraud. In fact, our members report the success of the Service’s guidance in helping participants getting access to much needed retirement funds.

The Service Should Not Preempt State Notarization Practices. Code section 417 simply requires that spousal consent “is witnessed by a plan representative or a notary public.” Public notaries are regulated by the states, and notarization is used for a variety of documents that are just as important as spousal consent to a distribution or beneficiary designation. The Service should have no concern if a notarization is executed via live audio-video technology that otherwise satisfies the requirements of participant elections under Treas. Reg. § 1.401(a)-21 and is consistent with state law requirements that apply to the notary public. Successful implementation of the temporary rule has demonstrated that states can adequately protect their citizens with respect to a variety of important documents, of which retirement plan elections are only one.¹

The applicable Treasury regulations, promulgated in 2006, contemplated that remote notarization would eventually be widely available and thus appropriate to incorporate in the rules. Specifically, Treas. Reg. § 1.401(a)-21(d)(6)(iii) states that the Commissioner may provide in guidance published in the Internal Revenue Bulletin that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement if those procedures with respect to the electronic system provide the same safeguards for participant elections as are provided through the physical presence requirement.

Social Distancing Will Likely Continue After December 31, 2020. The temporary nature of the relief in Notice 2020-42 is premised on the idea that the public health emergency and the

¹ A small number of states have not adopted remote notarization. Some states, such as California, have opted for “mobile” notarization. Regardless of the approach in a state, every secretary of state is fully committed to a process that adequately protects against fraud relating to the signing of important documents. There is no reason the Service cannot depend on the sufficiency of the state process.

related social distancing that has been implemented will be completely resolved by the end of the year. Regardless of the timing of any vaccine, it is very likely that social distancing practices will continue past the end of 2020, particularly among vulnerable older retirees.

Thus, while we believe there are adequate reasons to make the relief in Notice 2020-42 permanent, at a minimum, the relief should be extended an additional year. We urge the Service to announce this extension as quickly as possible, so that plans do not waste time in late 2020 gearing up for having to force participants into what could be dangerous physical presence (if they could even find a notary public or plan representative willing to meet in person).

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Thank you for your consideration. Please do not hesitate to contact any of the undersigned organizations if you have any questions.

American Bankers Association
American Benefits Council
American Council of Life Insurers
American Financial Services Association
American Retirement Association
Committee of Annuity Insurers
The ERISA Industry Committee
Financial Services Institute
Finseca
Insured Retirement Institute
Investment Company Institute
National Association of Insurance and Financial Advisors
Retirement Industry Trust Association
Securities Industry and Financial Markets Association
Small Business Council of America
The SPARK Institute
U.S. Chamber of Commerce