

Extension of Temporary Relief from the Physical Presence Requirement for Spousal Consents Under Qualified Retirement Plans

Notice 2021-03

I. PURPOSE

In response to the continuing public health emergency caused by the Coronavirus Disease 2019 (COVID-19) pandemic, and the related social distancing that has been implemented, this notice extends from January 1, 2021, through June 30, 2021, the temporary relief provided in Notice 2020-42, 2020-26 I.R.B. 986, from the physical presence requirement in Treasury Regulation § 1.401(a)-21(d)(6) for participant elections required to be witnessed by a plan representative or a notary public, including spousal consent required under § 417 of the Internal Revenue Code, and solicits comments with respect to the relief.

II. BACKGROUND

On March 13, 2020, the President determined that the COVID-19 pandemic was of sufficient severity and magnitude to warrant an emergency determination under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207. Providing alternative procedures for notarization and consent related to plan distributions that do not require physical presence is an appropriate emergency protective measure during this declared emergency period and is consistent with the physical distancing procedures implemented by the states.

Section 1.401(a)-21 sets forth standards for the use of an electronic medium to provide applicable notices to recipients or to make participant elections with respect to a retirement plan, an employee benefit arrangement, or an individual retirement plan.

Section 1.401(a)-21(e)(6) defines a participant election as any consent, election, request, agreement, or similar communication made by or from a participant, beneficiary, alternate payee, or an individual entitled to benefits under a retirement plan, employee benefit arrangement, or individual retirement plan. Section 1.401(a)-21(d) sets forth the following conditions for participant elections:

(1) The individual must be effectively able to access the electronic medium used to make the participant election;

(2) The electronic system must be reasonably designed to preclude any person other than the appropriate individual from making the participant election;

(3) The electronic system must provide the individual making the participant election with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election before it becomes effective; and

(4) The individual making the participant election, within a reasonable time, must receive confirmation of the election through either a written paper document or an electronic medium under a system that satisfies the applicable notice requirements under § 1.401(a)-21.

The participant election rules in § 1.401(a)-21(d) apply to plans that are subject to the qualified joint and survivor (QJSA) requirements of § 417. Accordingly, for a plan subject to the QJSA requirements, a participant's consent to a distribution may be provided through the use of electronic media if the plan complies with the standards described in § 1.401(a)-21(d), provided that the participant also obtains a valid spousal consent, if applicable.

Section 417 requires spousal consent to a waiver of a QJSA, which includes the waiver of a QJSA as part of a request for a plan distribution or a plan loan. Section 417 further requires that the spousal consent be witnessed by a plan representative or a notary public. Section 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 to a waiver of a QJSA 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)(ii) provides that, if the signature is witnessed in the physical presence of a notary public, an electronic signature acknowledging the signature (in accordance with section 101(g) of the Electronic Signatures in Global and National Commerce Act, Pub. L. 106-229, 114 Stat. 464 (2000) (E-SIGN),¹ and applicable state law for notaries public) will not be denied legal effect.

Section 1.401(a)-21(d)(6)(iii) provides 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, 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.

¹ Section 101(g) of E-SIGN provides that “[i]f a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.”

Section 1.401(a)-21(d) permits electronic notarization of participant elections. However, the physical presence requirement in § 1.401(a)-21(d)(6) would preclude the use of remote notarizations of participant elections, including spousal consents.

Remote electronic notarizations differ from electronic notarizations in that remote electronic notarizations generally are conducted remotely over the internet using digital tools and live audio-video technologies, whereas electronic notarizations can be signed electronically but still require that certain signatures be witnessed in the physical presence of a notary public or plan representative. The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) received several requests from stakeholders to permit remote electronic notarization of spousal consents for plan loans and distributions during the COVID-19 pandemic. These stakeholders stated that due to the social distancing measures with respect to the COVID-19 pandemic, the physical presence requirement in § 1.401(a)-21(d)(6) makes it difficult, if not impossible, for a participant to receive a plan distribution or plan loan (or for a qualified individual to receive a coronavirus-related distribution or plan loan) for which spousal consent is required. While recognizing the need for relief, other stakeholders requested that any relief take into account spousal protections, including limiting the relief solely to the physical presence requirement and making the relief temporary.

Notice 2020-42 provides temporary relief from the physical presence requirement in § 1.401(a)-21(d)(6) for any participant election witnessed by a notary public of a state that permits remote electronic notarization or by a plan representative, if the requirements of section III of Notice 2020-42 are satisfied. The temporary relief provided in Notice 2020-42 covers the period from January 1, 2020, through December

31, 2020. The Treasury Department and the IRS have received requests from stakeholders to make the relief provided in Notice 2020-42 permanent or, at a minimum, to extend the temporary relief period, in light of the continuing public health emergency caused by the COVID-19 pandemic.

III. GRANT OF RELIEF

For the period from January 1, 2021, through June 30, 2021, this notice extends the temporary relief provided in Notice 2020-42 from the physical presence requirement in § 1.401(a)-21(d)(6), if the related requirements in subsection A or B of this section III are satisfied. In particular, this notice extends the following two types of temporary relief (under terms that are identical to the temporary relief provided in Notice 2020-42):

(1) temporary relief from the physical presence requirement for any participant election witnessed by a notary public of a state that permits remote electronic notarization, and

(2) temporary relief from the physical presence requirement for any participant election witnessed by a plan representative.

During this temporary relief period, a participant is still able to have a participant election witnessed in the physical presence of a notary public and have that participant election be accepted by a plan in accordance with § 1.401(a)-21(d)(6)(i).

A. Temporary Relief from the Physical Presence Requirement for any Participant Election Witnessed by a Notary Public

In the case of a participant election witnessed by a notary public, for the period from January 1, 2021, through June 30, 2021, the physical presence requirement in § 1.401(a)-21(d)(6) 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 § 1.401(a)-21(d)(6) and is consistent with state law requirements that apply to the notary public.

B. Temporary Relief from the Physical Presence Requirement for any Participant Election Witnessed by a Plan Representative

In the case of a participant election witnessed by a plan representative, for the period from January 1, 2021, through June 30, 2021, the physical presence requirement in § 1.401(a)-21(d)(6) is deemed satisfied for an electronic system if the electronic system using live audio-video technology satisfies the following requirements:

(1) 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;

(2) 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);

(3) 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

(4) 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 § 1.401(a)-21(c).

IV. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1632. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information is in section III.B of this notice. One of the conditions for receiving temporary relief from the physical presence requirement in § 1.401(a)-21(d) is that the plan representative acknowledge that he or she has witnessed the signature and transmit the signed document, including the acknowledgement, back to the person under a system that satisfies the applicable notice requirements under § 1.401(a)-21. This condition is similar to the confirmation requirement for participant elections in § 1.401(a)-21(d), requiring that the individual making a participant election, within a reasonable time, receive a confirmation of the election through either a written paper document or an electronic medium under a system that satisfies the applicable notice requirements under § 1.401(a)-21(c). Notice 2020-42 included a statement that it had been determined that the plan representative's acknowledgment that he or she witnessed the signature of the participant election is a minor modification to the control number 1545–1632 and does not result in any additional paperwork burden. For the same reason, this extension of the temporary relief from the physical presence requirement does not result in any additional paperwork burden.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by § 6103.

V. REQUEST FOR COMMENTS

The Treasury Department and the IRS invite comments relating to the temporary relief from the physical presence requirement in § 1.401(a)-21(d)(6). In particular, the Treasury Department and the IRS request comments on whether relief from the physical presence requirement should be made permanent and, if made permanent, what, if any, procedural safeguards are necessary in order to reduce the risk of fraud, spousal coercion, or other abuse in the absence of a physical presence requirement. 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. Thus, if the Treasury Department and IRS decide to propose modifying the physical presence requirement on a permanent basis, there will be additional opportunity for comment.

Comments should be submitted in writing and should include a reference to Notice 2021-03. Comments may be submitted in one of two ways:

(1) Electronically via the Federal eRulemaking Portal at www.regulations.gov (type IRS-2020-0049 in the search field on the regulations.gov homepage to find this notice and submit comments).

(2) Alternatively, by mail to: Internal Revenue Service, Attn: CC:PA:LPD:PR (Notice 2021-03), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington D.C.20044.

All commenters are strongly encouraged to submit public comments electronically. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Treasury Department and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket.

VI. EFFECT ON OTHER DOCUMENTS

Notice 2020-42 is modified.

VII. DRAFTING INFORMATION

The principal authors of this notice are Arslan Malik and Pamela R. Kinard of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information regarding this notice, contact Arslan Malik at (202) 317-6700 or Pamela R. Kinard at (202) 317-6000 (not toll-free numbers).