

Extension of Temporary Relief from the Physical Presence Requirement

Notice 2021-40

I. PURPOSE

This notice provides a 12-month extension, through June 30, 2022, of the temporary relief provided in Notice 2021-3, 2021-2 IRB 316, from the physical presence requirement in § 1.401(a)-21(d)(6) for participant elections required to be witnessed by a plan representative or a notary public (the physical presence requirement). This notice also requests specific comments, by September 30, 2021, regarding the physical presence requirement. This extension of relief is provided to respond to the continuing Coronavirus Disease 2019 (COVID-19) pandemic and to permit consideration of stakeholder comments provided pursuant to this notice and Notice 2021-3.

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. In response to the public health emergency caused by the COVID-19 pandemic and related social distancing precautions, Notice 2020-42, 2020-26 IRB 986, provided temporary relief through December 31, 2020, from the physical presence requirement for any participant election witnessed by a notary public of a state that permits remote electronic notarization or by a plan representative, if certain requirements were satisfied. Notice 2021-3 (1) extended this temporary relief through June 30, 2021, (2) noted that, 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), (3)

solicited 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, and (4) stated that any permanent modification of the physical presence requirement would be made through the regulatory process, thus providing an additional opportunity for stakeholders to provide comments.

The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) received several comments from stakeholders requesting permanent relief from the physical presence requirement. In addition, some stakeholders asked for additional time to submit comments about whether the physical presence requirement should be modified in light of concerns regarding potential fraud, spousal coercion, or other abuse.

III. EXTENSION OF RELIEF

This notice extends, for the 12-month period from July 1, 2021, through June 30, 2022, the temporary relief provided in Notice 2021-3, including extension of all the requirements to qualify for that relief. Accordingly, for that 12-month period, a plan may qualify for relief from the physical presence requirement for any participant election witnessed by a notary public or a plan representative using an electronic system that satisfies the applicable requirements specified in section III.A and B of Notice 2021-3.

IV. REQUEST FOR COMMENTS

The Treasury Department and the IRS request comments on whether permanent guidance modifying the physical presence requirement should be issued. After review and consideration of the comments received in response to this notice and Notice 2021-3,

the Treasury Department and the IRS 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.

Specifically, the Treasury Department and the IRS request comments regarding: (1) how the temporary removal of the physical presence requirement for participant elections required to be witnessed by a plan representative or a notary public has affected costs and burdens for all parties (for example, participants, spouses, and plans) and whether there are costs and burdens associated with the physical presence requirement that support modifying the requirement on a permanent basis; (2) 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; (3) how participant elections are being witnessed, or are expected to be witnessed, as the COVID-19 pandemic abates (for example, whether the availability of in-person notarization has returned, or is expected to return, to pre-COVID-19 pandemic levels); (4) 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; and (5) if guidance permanently modifying the physical presence requirement is issued, whether the guidance should establish procedures for witnessing by plan representatives that are different from procedures for witnessing by notaries.

Comments should be submitted in writing by September 30, 2021, and should

include a reference to **Notice 2021-40**. Comments may be submitted electronically via the Federal eRulemaking Portal at www.regulations.gov (type **IRS-2021-40** in the search field on the regulations.gov homepage to find this notice and submit comments).

Alternatively, comments may be mailed to: Internal Revenue Service, Attn: CC:PA:LPD:PR (**Notice 2021-40**), 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.

V. EFFECT ON OTHER DOCUMENTS

Notice 2021-3 is modified.

VI. 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).