

Extension of Temporary Relief from the Physical Presence Requirement Through December 31, 2022

Notice 2022-27

I. PURPOSE

This notice provides a 6-month extension, through December 31, 2022, of the temporary relief provided in Notice 2021-40, 2021-28 IRB 15, from the requirement in § 1.401(a)-21(d)(6)(i) that certain participant elections be witnessed in the physical presence of a plan representative or a notary public (the physical presence requirement). This extension of relief is provided in response to the continuing Coronavirus Disease 2019 (COVID-19) pandemic.

II. BACKGROUND

A. Temporary Relief from the Physical Presence Requirement and Requests for Comments

On March 13, 2020, the President determined that the COVID-19 pandemic was of sufficient severity and magnitude to warrant an emergency determination beginning March 1, 2020, under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207 (the national emergency). See 85 FR 15337.

In response to the national 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 that was witnessed by a notary public or by a plan representative, using an electronic system that satisfied the applicable requirements specified in section III.A and B, respectively, of Notice 2020-42.

Notice 2021-03, 2021-2 IRB 316, extended the temporary relief from the physical presence requirement through June 30, 2021, if the requirements specified in section III.A and B of Notice 2021-03 were satisfied (under terms that were identical to the requirements in section III.A and B of Notice 2020-42). Notice 2021-03 noted that, during the temporary relief period, a participant would still be 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). Notice 2021-03 also requested comments on whether relief from the physical presence requirement should be made permanent and, if made permanent, what, if any, procedural safeguards would be necessary to reduce the risk of fraud, spousal coercion, or other abuse in the absence of the physical presence requirement. Notice 2021-03 further 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.

Notice 2021-40 extended the temporary relief from the physical presence requirement through June 30, 2022, if the applicable requirements specified in section III.A and B of Notice 2021-03 are satisfied. Notice 2021-40 also requested comments on specific matters relating to the relief from the physical presence requirement, including comments on whether to propose modifications to the physical presence requirement.

B. Stakeholder Comments and Agency Review

Following the publication of Notices 2020-42, 2021-03, and 2021-40, the Department of the Treasury (Treasury Department) and the Internal Revenue Service

(IRS) received comments from numerous stakeholders regarding the physical presence requirement. Some stakeholders requested permanent relief from the physical presence requirement; other stakeholders stated that the existing physical presence requirement should be retained.

The Treasury Department and the IRS are currently reviewing the stakeholder comments to determine whether to retain the physical presence requirement without modification or to propose to modify the requirement. If the Treasury Department and the IRS decide to propose to modify the physical presence requirement, they will do so only through the regulatory process, which will include the opportunity for further comment.

C. Continuing COVID-19 Pandemic

On February 18, 2022, the President determined that the COVID-19 pandemic continued to cause a significant risk to public health and safety and extended the national emergency beyond March 1, 2022. See 87 FR 10289. Accordingly, section III of this notice provides an additional 6-month extension, through December 31, 2022, of the temporary relief from the physical presence requirement provided in Notice 2021-40. However, 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.

III. EXTENSION OF TEMPORARY RELIEF FROM THE PHYSICAL PRESENCE REQUIREMENT

This notice extends, for the 6-month period from July 1, 2022, through December 31, 2022, the temporary relief from the physical presence requirement

provided in Notice 2021-40, including extension of the requirements to qualify for that relief. Accordingly, for this 6-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, respectively, of Notice 2021-03.

IV. EFFECT ON OTHER DOCUMENTS

Notice 2021-40 is modified.

V. DRAFTING INFORMATION

The principal author of this notice is Tyler Forni of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information regarding this notice, contact Tyler Forni at (202) 317-4102 (not a toll-free number).