

INTERNAL REVENUE BULLETIN



HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2021-28
July 12, 2021

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

EMPLOYEE PLANS

Notice 2021-40, page 15.

This notice is a 12-month extension of the relief provided in Notice 2020-42, as extended by Notice 2021-3. For the period from July 1, 2021, through June 30, 2022, this notice extends two types of relief from the physical presence requirement in § 1.401(a)-21(d)(6)(i) for participant elections required to be witnessed by a plan representative or a notary

public: (1) temporary relief from the physical presence requirement for any participant election witnessed by a notary public in a state that permits remote notarization (either by law or through an executive order), and (2) temporary relief from the physical presence requirement for any participant election witnessed by a plan representative. This notice also solicits comments on whether permanent guidance modifying the physical presence requirement in § 1.401(a)(21)-1(d)(6)(i) should be issued.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned

against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

The contents of this publication are not copyrighted and may be reprinted freely. A citation of the Internal Revenue Bulletin as the source would be appropriate.

Part III

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 re-

quirement 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](http://www.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).

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the

new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the

new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.

ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
FR.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.

PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

Numerical Finding List¹

Bulletin 2021–28

Notices:

2021-39, 2021-27 I.R.B. 3
2021-40, 2021-28 I.R.B. 15

Revenue Procedures:

2021-28, 2021-27 I.R.B. 5
2021-29, 2021-27 I.R.B. 12

Revenue Rulings:

2021-12, 2021-27 I.R.B. 1

¹ A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2021–27 through 2021–52 is in Internal Revenue Bulletin 2021–52, dated December 27, 2021.

Finding List of Current Actions on Previously Published Items¹

Bulletin 2021–28

¹ A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2021–27 through 2021–52 is in Internal Revenue Bulletin 2021–52, dated December 27, 2021.

Internal Revenue Service

Washington, DC 20224

Official Business
Penalty for Private Use, \$300

INTERNAL REVENUE BULLETIN

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at www.irs.gov/irb/.

We Welcome Comments About the Internal Revenue Bulletin

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can email us your suggestions or comments through the IRS Internet Home Page (www.irs.gov) or write to the Internal Revenue Service, Publishing Division, IRB Publishing Program Desk, 1111 Constitution Ave. NW, IR-6230 Washington, DC 20224.