



Via Electronic Delivery

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Room 5203

Internal Revenue Service

P.O. Box 7604

Ben Franklin Station

Washington, DC 20044

RE: Use of an Electronic Medium to Make Participant Elections and Spousal Consents (RIN 1545-BQ50)

To Whom It May Concern:

This is the U.S. Chamber of Commerce's (Chamber) response to the Internal Revenue Service, Treasury's (IRS) notice of proposed rulemaking on "Use of Electronic Medium to Make Participant Elections and Spousal Consent" (NPRM), which provides for remote witnessing. The Chamber supports the IRS' efforts on remote notarization, which balance spousal protections with the practical realities of both participants and beneficiaries and plan sponsors. Our comments are below.

Background

Internal Revenue Code (IRC) section 417 requires spousal consent for plans that are subject to the qualified joint and survivor annuity and qualified preretirement survivor annuity rules. Under the IRC, spousal consent to waive spousal rights is only valid if the spouse consents in writing to the election, and, among other requirements, the spouse's consent is witnessed by a plan representative or a notary public. 26 U.S.C. § 417(a)(2)(A)(i).

26 CFR Section 1.401(a)-21 relates to rules for the use of electronic medium to provide notices and to making participant elections, including spousal elections. Paragraph (6) deals with elections and spousal consents that are required to be witnessed by a plan representative or a notary public, but it does not specifically provide for remote witnessing. Instead, it states that the election must be witnessed in the physical presence of a plan representative or a notary public, but an electronic notarization acknowledging a signature will not be denied legal effect if the signature of the individual is witnessed in the physical presence of a notary public.

The example in the regulation provides a scenario in which the spousal consent is captured electronically during an in-person meeting with the notary public, which is then transferred to the plan representative electronically. 26 CFR § 1.401(a)-21(f). Example 3. The final regulation was issued on October 20, 2006, and, therefore, it makes no mention of remote notarization or witnessing because it was not until 2011 when Virginia was the first state to authorize remote notarization, followed by Montana in 2015 and Nevada and Texas in 2017.<sup>1</sup>

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<sup>1</sup> "Background on Remote Electronic Notarization," National Association of Secretaries of State, last accessed on February 15, 2023 available at <https://www.nass.org/initiatives/remote-electronic-notarization#:~:text=However%2C%20in%202011%20Virginia%20became,Nevada%20and%20Texas%20in%202007.>

The pace of states authorizing remote notarization increased after 2017, and the COVID-19 pandemic hastened either permanent or temporary legislations authorizing remote notarization. According to the National Association of Secretaries of State, today 47 states and Washington, D.C. authorize remote e-notarization either through an existing law or emergency action.<sup>2</sup>

Recognizing the need to address spousal consent witnessing during the COVID-19 pandemic, the IRS first provided for temporary relief from the physical presence requirement for spousal consent in Notice 2020-42 and extended the relief in Notices 2021-03, 2021-40 and 2022-07. Not only did Notices 2020-42 and 2021-03 provide temporary relief from the physical presence requirement for both notary publics and plan representatives, but the Notices also contain security requirements and participant and beneficiary protections that are stricter than the current in-person physical presence requirements. With respect to notary publics, the physical presence requirement “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.” Although state laws may differ slightly, there are similar requirements under all state remote notarization laws.<sup>3</sup> Just like physical notarization, the remote authorization laws require authentication of the person signing. More importantly, all state laws require the notarization to be recorded. This requirement provides more protection than the current physical requirement because it requires an electronic audit trail of the witnessing which protects spouses if the signature were questioned or challenged.

With respect to the plan representative witnessing, Notice 2021-03 requires the same authentication that physical presence does, however, the plan representative also is required to transmit the signed document and acknowledgment to the person signing it, which creates an electronic paper trail benefitting spouses if the signature were questioned or challenged.

### Implementation

Plans have been using this relief for almost three years, and systems are now in place allowing both in-person and remote witnessing, depending on the individual’s choice. During this three-year period, remote notarization has allowed participants and beneficiaries to save time and money in obtaining notarized consent,<sup>4</sup> and it has been especially beneficial for a variety of individuals, such as those with mobility limitations, who work non-traditional schedules (e.g., first responders, health care professionals and manufacturers) and who live more remote areas.

As noted in our prior letters on this issue, the Chamber is in a unique position because it represents both plan sponsors and service providers, which gives us input from a large variety of stakeholders. We have not received any indication from either plan sponsors or services providers of evidence of fraud, spousal coercion or other abuse. In fact, given that many plans use notary witnessing, the incidents of fraud have been lessened because of the state level regulation. The notary public community has explained that most of the concerns with fraud are not true, and other possible concerns are being addressed through more secure remote notarization processes.<sup>5</sup> As remote notarization has evolved, the notary public community has

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<sup>2</sup> Id.

<sup>3</sup> See “Remote Online Notarization Across State Lines”, p. 1, DocuSign, available at [https://www.docusign.com/sites/default/files/resource\\_event\\_files/remote\\_online\\_notarization\\_across\\_state\\_lines.pdf#:~:text=Many%20of%20the%20core%20elements.an%20informed%20and%20willing%20act,](https://www.docusign.com/sites/default/files/resource_event_files/remote_online_notarization_across_state_lines.pdf#:~:text=Many%20of%20the%20core%20elements.an%20informed%20and%20willing%20act,) last accessed February 15, 2023.

<sup>4</sup> See <https://www.nationalnotary.org/knowledge-center/about-notaries/notary-fees-by-state#Kansas>

<sup>5</sup> See “5 Myths About Remote Online Notarization”, Andrew Macdougall, July 31, 2019 available at <https://www.notarize.com/blog/5-myths-about-remote-online-notarization.>

added safeguards and training for notaries to detect and address any potential for fraud or coercion for remote notarization, similar to what they have done for in-person notarization.<sup>6</sup>

### Response to the NPRM

The NPRM is similar to the guidance in Notices 2020-42 and 2021-03, with one exception. Specifically, the NPRM would require that witnessing by a plan representative be recorded and retained.<sup>7</sup>

Overall, the Chamber supports the IRS' efforts on remote notarization and the NPRM. The NPRM gives plans and participants flexibility by allowing both in-person and remote witnessing. Plan sponsors believe that participants and beneficiaries should be allowed to obtain consent in a way that suits them, and the plan should not dictate whether it be in-person or remote. As such, we fully support the approach taken in the NPRM.

The NPRM amends 26 CFR Section 1.401(a)-21, and it addresses situations where the IRC specifically requires spousal consent to be notarized or witnessed. To protect other spousal interests, some plans may require witnessed spousal consent beyond what the IRC requires. The IRS/Treasury may want to clarify that any final rule is a safe harbor not only for witnessing the IRC requires, but also for any spousal consent witnessing a plan may require.

Although we understand why the IRS included the requirement that plan representative witnessing be recorded and retained, we have heard some concern with compliance with state recording laws. Unlike notaries who are subject to the state law in which they are licensed, a plan representative would not be subject to this restrictions and questions have arisen on how a plan representative would be able to obtain the consent to record and retain the witnessing. For example, some states require all parties to consent to recordings, while others only require one party to consent. Furthermore, sometimes consent can be implied, other times it has to be express. This is especially difficult in the context of qualified plans which often cover employees across various states, and it is likely that the plan representative is in a different state than the participant and the spouse. If the IRS retains this requirement, it would be helpful to have additional guidance and examples of how a plan representative could comply with this, especially where the individuals are in different states with different laws.

### Conclusion

The Chamber appreciates the IRS' work on remote witnessing, especially during the uncertainty of the COVID-19 pandemic. We also appreciate the practical approach that protects plan participants and beneficiaries, but also allows for flexibility. We look forward to working with you as you finalize these regulations.

Sincerely,

*Chantel Sheaks*

Chantel Sheaks  
Vice President, Retirement Policy

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<sup>6</sup> See "How to prevent fraud as a Remote Online Notary", Kelly Rush, Sept. 2, 2020, National Notary Association available at <https://www.nationalnotary.org/notary-bulletin/blog/2020/09/how-to-prevent-fraud-as-a-remote-online-notary>. Given that Virginia has allowed remote notarization since 2011, were there wide incidents of fraud and abuse, there should have been evidence of that in the past 12 years.

<sup>7</sup> See Prop. Reg. 26 CFR §1.401(a)-21(d)(6)(ii)(B)(2)(B)(5).