

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

CHANTEL SHEAKS  
VICE PRESIDENT  
EMPLOYMENT POLICY DIVISION

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WASHINGTON, D.C. 20062  
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**Via Electronic Delivery**

April 23, 2021

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2021-03)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

**Re: Permanent Relief for Remote Witnessing Procedures**

In response to the request for comments included in Notice 2021-03, the U.S. Chamber of Commerce (Chamber) encourages the Internal Revenue Service (Service) to make permanent the temporary relief from the physical presence requirement for spousal consents as originally announced in Notice 2020-42 and extended by Notice 2021-03.

Last fall, the Chamber was part of a group of trades that urged the Service to make permanent the temporary remote witnessing rules for spousal consents or, at a minimum, extend that relief through the end of the pandemic. We appreciate the six-month extension provided in Notice 2021-03 (which expires on June 30, 2021). As part of a group of trades in a letter date April 19, 2021 and through this letter, we urge the Service to make this the procedures outlined in Notice 2021-03 permanent. We are encouraged by Commissioner Charles Rettig's support for remote witnessing in his testimony during the March 18, 2021 House Ways and Means Committee hearing.

We believe the Service could make the remote witnessing rules permanent through publication of procedures in the Internal Revenue Bulletin. However, if the Service's position is that it must amend current regulations through notice and comment, we urge the Service to keep the relief in Notice 2021-03 until any amendments are finalized.

**Authority to Issue Permanent Relief**

Current regulations allow the Commissioner to provide guidance in the Internal Revenue Bulletin relating to procedures for using electronic systems to satisfy the physical presence requirement. Treasury Regulation Section 1.401(a)-21(d)(6)(iii) provides the following:

***Delegation to Commissioner.*** In guidance published in the Internal Revenue Bulletin, the Commissioner may provide that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement under paragraph (d)(6)(i) of this section, 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.

We believe that Notices 2020-42 and 2021-03 can be the basis for such procedures. The Notices provide temporary relief from the physical presence requirement for both notary publics and plan representatives. They 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.” As of April 21, 2021, there were 32 states that allowed for remote notarization, and this number appears to be growing rapidly. State laws may differ slightly, but there are similar requirements under all state remote notarization laws.<sup>1</sup> Just like physical notarization, the remote authorization laws require authentication of the person signing. More importantly, all state laws require the notarization is recorded. This requirement provides more protection than the current physical requirement because it requires an electronic audit trail of the witnessing, which will protect spouses were the signature to be 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, which will create an electronic paper trail that will benefit spouses were the signature to be questioned or challenged.

### **Notice and Comment**

If notice and comment is necessary to address the physical presence requirement, we urge the Service to extend Notice 2021-03 through the notice and comment period. Not only will this help plan participants and beneficiaries during the current pandemic, it also will provide options to individuals who may not have easy access to notaries or plan representatives because they live in remote areas, may not be able to take time away from work, may not have easy access to transportation or have physical limitations.

We applaud the work the Service has done to assist participants, beneficiaries and plan sponsors during the pandemic, including Notices 2020-42 and 2021-03. The use of remote witnessing has streamlined plan administration during the pandemic and allowed for individuals to gain access to their accounts who may not otherwise have been able to satisfy the physical presence requirements. Going forward, we believe that remote witnessing should be allowed alongside the physical presence option to help plan administrators in streamlining plan operations and assist participants and

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<sup>1</sup> See “Coronavirus: Federal and state governments work quickly to enable remote online notarization to meet global crisis”, DLA Piper, available at <https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/>, last accessed April 19, 2021.

beneficiaries who may have difficulty meeting the physical presence requirements, provided the safeguards in Notices 2020-42 and 2021-03 are in place to protect participants and their spouses.

Sincerely,

*Chantel Sheaks*

Chantel Sheaks  
Vice President, Retirement Policy

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