

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

CHANTEL SHEAKS
VICE PRESIDENT
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5458

Via Electronic Delivery

September 29, 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 2021-40, 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 consent as originally announced in Notice 2020-42 and extended by Notices 2021-03 and 2021-40. The Chamber appreciates the relief provided due to the COVID-19 pandemic, and we believe that the use and effectiveness of the relief warrants that it be made permanent, which, as explained below, can be done without the need for a formal rulemaking process.

Request for comments

In Notice 2021-40, the Service requested comments on five specific topics, each of which is addressed below.

Lower costs and burdens

In Notice 2021-40 the Service asks “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...and whether there are costs and burdens associated with the physical presence requirement that support modifying the requirement on a permanent basis.”

Allowing for remote notarization saves participants and beneficiaries both time and money in obtaining spousal consent. Obviously, the ability to obtain spousal consent remotely means that participants and beneficiaries do not need to travel to a notary’s location. Although some notaries may come to a participant’s or beneficiary’s home, the notary may charge for travel, and most

state laws do not restrict how much a notary may charge for travel time, which could increase the cost for obtaining spousal consent.¹

Finally, allowing for remote notarization is a significant benefit for a variety of individuals, such as those with mobility limitations, who work a non-traditional schedule (such as first responders, health care professionals and manufacturers) and who live in more remote areas.

No evidence of fraud or coercion

The Notice also asks “whether there is evidence that the temporary removal of the physical presence requirement has resulted in fraud, spousal coercion, or other abuse...” The Chamber is unique in its membership in that our members represent nearly all entities in the retirement community, from plan sponsors to service providers, and our members have not reported any evidence of fraud, spousal coercion or other abuse. Our members take their responsibility to obtain spousal consent seriously and to protect such rights. If other entities in the retirement community have specific evidence of fraud, spousal coercion or other abuse that our members do not, we urge them to publicly share this so that it may be addressed.

Finally, it is important to note that notary publics are regulated at the state level and within their own industry. The notary public community has explained that most of the concerns with fraud in the remote notarization context are not true and other possible concerns are being addressed through a more secure remote notarization process.² Further, as remote notarization has evolved, the notary public community has 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.³

Post-COVID witnessing

During the pandemic, individuals have become more comfortable with technology, including online notarization. As such, if allowed, plans and service providers will continue to allow its use. However, this would be along-side in-person notarization for those who wish to use it. Allowing remote notarization is just one tool, but not the exclusive tool, for plans to obtain the required spousal consent. How this is obtained would be left to a participant and beneficiary, depending on their own circumstances.

Procedures to safeguard elections

As noted above, plans and service providers have implemented remote notarization and witnessing throughout the pandemic using the guidelines laid out in Notice 2020-42. We believe

¹ See <https://www.nationalnotary.org/knowledge-center/about-notaries/notary-fees-by-state#Kansas>.

² 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>.

³ 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>.

that the safeguards in this Notice provide the necessary protections to participants and beneficiaries and no additional procedures are needed.

We believe that the IRS should consider that any permanent guidance recognize state remote notarization law. That is, to the extent that a state's notarial rules allow for remote online notarizations, the Service should recognize those standards as satisfying any notarial standards required by the Internal Revenue Code or any regulations.

Witnessing by plan representatives

We believe that the current requirements in Notice 2020-42 for remote witnessing by plan representatives strike the balance between administrative workability and protecting spousal rights. We do not think that additional procedures are needed, and plans should be allowed to continue remote plan representative witnessed under their current policies and procedures that align with Notice 2020-42.

Authority to issue permanent relief

As noted in our April 23, 2021 letter, 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.

Notices 2020-42 and 2021-03 should be the basis for such procedures because the Notices provide workable procedures for remote notarization and witnessing 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.

Notice and Comment

If notice and comment is necessary to address the physical presence requirement, as we previously stated, the Service should extend Notice 2021-40 through the notice and comment period. Not only will this help plan participants and beneficiaries during the current pandemic, but as we emerge from it, this 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 , may have physical limitations, or may be making a request due to a natural disaster.

Conclusion

We applaud the work the Service has done to assist participants, beneficiaries and plan sponsors during the pandemic, including Notices 2020-42, 2021-03 and 2021-40. 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 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

Enclosure: April 23, 2021 Letter Requesting Permanent Relief

cc: Sunita Lough, Commissioner of Tax Exempt and Governmental Entities
Carol Weiser, Benefits Tax Counsel
Rachel Levy, Associate Chief Counsel
Pamela Kinard, Office of the Associate Chief Counsel

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April 23, 2021

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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 dated April 19, 2021 and through this letter, we urge the Service to make these procedures outlined in Notice 2021-03 permanent. We are encouraged by Commissioner Charles Retting'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.¹ 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

¹ 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,

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