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RE: Notice 2020-42, Remote Notarization

The undersigned organizations write to request that the Internal Revenue Service (“Service”) make permanent the temporary relief from the physical presence requirement for spousal consent in Notice 2020-42.

The Internal Revenue Code (“Code”) requires retirement plans to obtain spousal consent for certain distributions and beneficiary elections, which must be witnessed by a notary or plan representative. Treasury regulations allow the Service to provide in guidance that electronic systems satisfy the physical presence requirement, if those systems provide the same safeguards as witnessing spousal consent in person. In Notice 2020-42, the Service provided relief for any participant election witnessed by a notary public of a state that permits remote electronic notarization, or witnessed by a plan representative electronically meeting certain requirements. The relief is temporary, however, and is due to end on December 31, 2020.

Notice 2020-42 is an example of the government’s rapid and flexible response to the COVID-19 pandemic and was welcomed by the retirement plan community. To protect participants (especially at-risk retirees), many plan sponsors and their service providers implemented remote notarization quickly after the relief was provided. Remote notarization has proven successful, is popular with participants, and is quickly gaining broad acceptance in states. Accordingly, we believe it is appropriate to make the guidance in Notice 2020-42 permanent.

Remote notarization fully protects participants and their spouses. Remote notarization is now available in almost all states, for a variety of situations in which notarization is needed. Using video technology, states impose protections to ensure that an individual is who they say they are and that the document is being signed contemporaneously. E-notarization “in person” supported by audio and visual technology provides strong consumer safeguards.

For spousal consent witnessed by a plan representative, Notice 2020-42 imposes similar safeguards. The following requirements all must be met:

- The individual signing the participant election must present a valid photo ID to the plan representative during the live audio-video conference, and may not merely transmit a copy of the photo ID prior to or after the witnessing.
- The live audio-video conference must allow for direct interaction between the individual and the plan representative (for example, a pre-recorded video of the person signing is not sufficient).
- The individual must transmit by fax or electronic means a legible copy of the signed document directly to the plan representative on the same date it was signed.
- After receiving the signed document, the plan representative must acknowledge that the signature has been witnessed by the plan representative in accordance with the requirements of this notice and transmit the signed document, including the acknowledgement, back to the individual under a system that satisfies the applicable notice requirements under Treas. Reg. § 1.401(a)-21(c).

No system can ever completely eliminate fraud, but the use of state-approved remote notarization or the safeguards mentioned above for plan representatives provide at least as robust protection as in-person signatures. We are aware of no evidence that remote notarization has led to an increase in fraud. In fact, our members report the success of the Service’s guidance in helping participants getting access to much needed retirement funds.

The Service Should Not Preempt State Notarization Practices. Code section 417 simply requires that spousal consent “is witnessed by a plan representative or a notary public.” Public notaries are regulated by the states, and notarization is used for a variety of documents that are just as important as spousal consent to a distribution or beneficiary designation. The Service should have no concern if a notarization is executed via live audio-video technology that otherwise satisfies the requirements of participant elections under Treas. Reg. § 1.401(a)-21 and is consistent with state law requirements that apply to the notary public. Successful implementation of the temporary rule has demonstrated that states can adequately protect their citizens with respect to a variety of important documents, of which retirement plan elections are only one.¹

The applicable Treasury regulations, promulgated in 2006, contemplated that remote notarization would eventually be widely available and thus appropriate to incorporate in the rules. Specifically, Treas. Reg. § 1.401(a)-21(d)(6)(iii) states that the Commissioner may provide in guidance published in the Internal Revenue Bulletin that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement if those procedures with respect to the electronic system provide the same safeguards for participant elections as are provided through the physical presence requirement.

Social Distancing Will Likely Continue After December 31, 2020. The temporary nature of the relief in Notice 2020-42 is premised on the idea that the public health emergency and the

¹ A small number of states have not adopted remote notarization. Some states, such as California, have opted for “mobile” notarization. Regardless of the approach in a state, every secretary of state is fully committed to a process that adequately protects against fraud relating to the signing of important documents. There is no reason the Service cannot depend on the sufficiency of the state process.

related social distancing that has been implemented will be completely resolved by the end of the year. Regardless of the timing of any vaccine, it is very likely that social distancing practices will continue past the end of 2020, particularly among vulnerable older retirees.

Thus, while we believe there are adequate reasons to make the relief in Notice 2020-42 permanent, at a minimum, the relief should be extended an additional year. We urge the Service to announce this extension as quickly as possible, so that plans do not waste time in late 2020 gearing up for having to force participants into what could be dangerous physical presence (if they could even find a notary public or plan representative willing to meet in person).

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Thank you for your consideration. Please do not hesitate to contact any of the undersigned organizations if you have any questions.

American Bankers Association
American Benefits Council
American Council of Life Insurers
American Financial Services Association
American Retirement Association
Committee of Annuity Insurers
The ERISA Industry Committee
Financial Services Institute
Finseca
Insured Retirement Institute
Investment Company Institute
National Association of Insurance and Financial Advisors
Retirement Industry Trust Association
Securities Industry and Financial Markets Association
Small Business Council of America
The SPARK Institute
U.S. Chamber of Commerce