

Temporary Relief from the Physical Presence Requirement for Spousal Consents Under Qualified Retirement Plans

Notice 2020-XX

I. PURPOSE

On March 13, 2020, the President of the United States issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in response to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic, beginning March 1, 2020 (COVID-19 Emergency). In response to this unprecedented public health emergency, and the related social distancing that has been implemented, this notice provides temporary relief from the physical presence requirement in § 1.401(a)-21(d)(6) of the Income Tax Regulations for participant elections required to be witnessed by a plan representative or a notary public, such as a spousal consent required under § 417 of the Internal Revenue Code (the Code). While this temporary relief, which covers the period from January 1, 2020, through December 31, 2020, is intended to facilitate the use of coronavirus-related distributions and plan loans to qualified individuals, as permitted by section 2202 of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 281 (2020) (CARES Act), the temporary relief applies to any participant election that requires the signature of the individual making the election to be witnessed in the physical presence of a plan representative or notary.

II. BACKGROUND

Section 2202(a) of the CARES Act permits certain individuals to receive from an eligible retirement plan (as defined in § 402(c)(8)(B)) up to \$100,000 for a coronavirus-

related distribution. Section 2202(a)(4)(A) defines a coronavirus-related distribution as any distribution from an eligible retirement plan made on or after January 1, 2020, and before December 31, 2020, to a qualified individual. A coronavirus-related distribution is not subject to the 10% additional tax under § 72(t) to the extent it meets the requirements of a coronavirus-related distribution. In addition, the coronavirus-related distribution may be included in gross income ratably over the 3-year period beginning with the taxable year of the distribution.

Section 2202(a)(3) of the CARES Act provides that a qualified individual may recontribute a coronavirus-related distribution (not to exceed the amount of the distribution) to an applicable eligible retirement plan in which the taxpayer is a beneficiary and to which a rollover can be made. However, a coronavirus-related distribution is not an eligible rollover distribution for purposes of the direct rollover rules of § 401(a)(31), the notice requirement under § 402(f), or the mandatory withholding rule under § 3405(c).

Section 2202(b)(1) of the CARES Act provides that in the case of any loan from a qualified employer plan (as defined under § 72(p)(4)) to a qualified individual made during the 180-day period beginning on the date of the enactment of the CARES Act, the \$50,000 aggregate loan limit in § 72(p)(2)(A)(i) is increased to \$100,000. In addition, the rule in § 72(p)(2)(A)(ii) limiting the aggregate amount of the loans to one-half of the present value of the vested accrued benefit of the employee is increased to 100 percent of the employee's vested accrued benefit under the plan.

Section 1.401(a)-21 sets forth standards for the use of an electronic medium to provide applicable notices to recipients, or to make participant elections, with respect to

a retirement plan, an employee benefit arrangement, or an individual retirement plan.

Section 1.401(a)-21(e)(6) defines a participant election as any consent, election, request, agreement, or similar communication made by or from a participant, beneficiary, alternate payee, or an individual entitled to benefits under a retirement plan, employee benefit arrangement, or individual retirement plan. Section 1.401(a)-21(d) sets forth the following conditions for participant elections:

- (1) The individual must be effectively able to access the electronic medium used to make the participant election;
- (2) The electronic system must be reasonably designed to preclude any person other than the appropriate individual from making the participant election;
- (3) The electronic system must provide the individual making a participant election with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election before it becomes effective; and
- (4) The individual making a participant election, within a reasonable time period, must receive a confirmation of the election through either a written paper document or an electronic medium under a system that satisfies the applicable notice requirements under § 1.401(a)-21.

The participant election rules in § 1.401(a)-21(d) apply to plans that are subject to the qualified joint and survivor (QJSA) requirements of § 417. Accordingly, for a plan subject to the QJSA requirements, a participant's consent to a distribution may be provided through the use of electronic media if the plan complies with the standards described in § 1.401(a)-21(d), provided that the participant also obtain a valid spousal consent, if applicable.

Section 417 requires spousal consent to a waiver of a QJSA, which would include the waiver of a QJSA as part of a request for a plan distribution or a plan loan. Section 417 further requires that the spousal consent be witnessed by a plan representative or a notary public. Section 1.401(a)-21(d)(6)(i) provides that, in the case of a participant election that is required to be witnessed by a plan representative or a notary public (such as a spousal consent to a waiver of a QJSA under § 417), the signature of the individual making the participant election must be witnessed in the physical presence of a plan representative or a notary public. Section 1.401(a)-21(d)(6)(ii) provides that, if the signature is witnessed in the physical presence of a notary public, an electronic signature acknowledging the signature (in accordance with section 101(g) of Electronic Signatures in Global and National Commerce Act, P.L. 106-229, 114 Stat. 464 (2000) (E-SIGN),¹ and applicable State law for notaries public) will not be denied legal effect.

Section 1.401(a)-21(d)(6)(iii) provides 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, 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.

As discussed in the background section of this notice, § 1.401(a)-21(d) permits electronic notarization of participant elections. However, the physical presence

¹ Section 101(g) of E-SIGN provides that “[i]f a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.”

requirement in § 1.401(a)-21(d)(6) would preclude the use of remote notarizations of participant elections, including spousal consents.

Remote notarizations differ from electronic notarizations in that remote notarizations generally are conducted over the internet using digital tools and accompanied by live audio-video technologies. The Department of the Treasury and the Internal Revenue Service have received several requests from practitioners and stakeholders to permit remote notarizations of spousal consents for plan loans and distributions during the COVID-19 Emergency. These practitioners and stakeholders argue that due to the social distancing measures with respect to the COVID-19 Emergency, the physical presence requirement in § 1.401(a)-21(d)(6) makes it difficult, if not impossible, for a participant to receive a plan distribution or plan loan (or a qualified individual to receive a coronavirus-related distribution or plan loan). While recognizing the need for relief, one stakeholder requested that any relief take into account spousal protections, such as limiting the relief solely to the physical presence requirement and making the relief temporary.

Remote electronic notarization is not uniformly applied by the States. For some States, remote electronic notarization is already in effect, while for some other States remote electronic notarization is in effect only temporarily through executive order. However, other States do not currently permit remote electronic notarization.

III. GRANT OF RELIEF

For the period from January 1, 2020, through December 31, 2020, this notice provides two types of temporary relief from the physical presence requirement in § 1.401(a)-21(d)(6) to the extent that the requirements in this Section III are satisfied:

(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.

A. Temporary Relief from the Physical Presence Requirement for any Participant Election Witnessed by a Notary Public

In the case of a participant election that is required to be witnessed by a notary public, for the period from January 1, 2020, through December 31, 2020, the physical presence requirement in § 1.401(a)-21(d)(6) is deemed satisfied for an electronic system that uses electronic 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 applicable State law for notaries public.

B. Temporary Relief from the Physical Presence Requirement for any Participant Election Witnessed by a Plan Representative

In the case of a participant election that is required to be witnessed by a plan representative, for the period from January 1, 2020, through December 31, 2020, the physical presence requirement in § 1.401(a)-21(d)(6) is deemed satisfied for an electronic system if the electronic system using live audio-video technology satisfies the following requirements:

(1) The individual signing the participant election must present valid photo ID to the plan representative during the live audio-video conference, not merely transmit the photo ID prior to or after the witnessing;

(2) The live audio-video conference must allow for direct interaction between the individual and the plan representative (for example, no pre-recorded videos of the person signing);

(3) 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; and

(4) 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 § 1.401(a)-21(c).

IV. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1632. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information is in Section 3.B of this notice. One of the conditions for receiving the temporary relief from the physical presence requirement in § 1.401(a)-21(d) is for the plan representative to acknowledge that he or she has witnessed the signature and transmit the signed document, including the acknowledgement, back to the person under a system that satisfies the applicable notice requirements under § 1.401(a)-21. This is similar to the confirmation requirement for participant elections in

§ 1.401(a)-21(d), requiring that the individual making a participant election, within a reasonable time period, receive a confirmation of the election through either a written paper document or an electronic medium under a system that satisfies the applicable notice requirements under § 1.401(a)-21(c). We have determined that the plan representative's acknowledgment that he or she witnessed the signature of the participant election is a minor modification to the control number 1545–1632 and should not result in any additional paperwork burden.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

V. 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 and Pamela R. Kinard at (202) 317-6000 (not toll-free numbers).