

RETIREMENT PLAN ELECTIONS/CONSENTS: IRS EXTENDS TEMPORARY RELIEF FROM THE PHYSICAL PRESENCE REQUIREMENT FOR PARTICIPANT ELECTIONS/CONSENTS WITNESSED BY A NOTARY PUBLIC OR PLAN REPRESENTATIVE

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Under the qualified retirement plan rules, there are certain circumstances in which a participant election or a spousal consent must be witnessed by a notary public or a plan representative. For purposes of witnessing those elections and consents, Notice 2020-42 provided relief from the physical presence requirement through December 31, 2020 if certain conditions were met. In late December, the IRS-issued Notice 2021-03 extends until June 30, 2021 the temporary relief from the physical presence requirement.

For a plan election or consent witnessed by a notary public of a state that permits remote electronic notarization, the physical presence requirement will be deemed satisfied if the remote electronic notarization is executed via a live audio-video technology that otherwise satisfies the requirements of participant elections under the qualified plan rules and complies with the state's notarization laws.

For a plan election or consent witnessed by a plan representative, four requirements must be met for the physical presence requirement to be deemed satisfied for an electronic system if the electronic system using live audio-video technology satisfies the following requirements:

- The individual signing the participant election must present a valid photo identification to the plan representative during the live audio-video conference.
- The live audio-video conference must allow for direct interaction between the individual and the plan representative.
- The individual must send a legible copy of the signed document by fax or other electronic means 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 requirements described above and transmit the signed document, including

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the plan representative's acknowledgement, back to the individual under a system meeting the following requirements:

- The individual must have the effective ability to access the system.
- The individual must be advised that he or she may request and receive a paper copy at no charge.

These procedures are intended to ensure that the electronic systems used for remote electronic notarization provide the same safeguards for participant elections as are provided by the physical presence requirement. Nonetheless, plan elections and consents may still be witnessed in the physical presence of a notary public and have that participant election.

This notice closes by asking for comments on whether the relief from the physical presence requirement should become permanent and, if so, what additional procedural safeguards are necessary to reduce the risk of fraud, spousal coercion, or other abuse in the absence of a physical presence requirement.