

September 30, 2021

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2021-40), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington D.C. 20044
Submitted Electronically

Re: Permanent Relief for Remote Witnessing

To Whom It May Concern:

Pursuant to Notice 2021-40 (Notice), The ERISA Industry Committee (ERIC) requests that the Department of Treasury (Treasury) and the Internal Revenue Service (IRS) allow for permanent relief from the physical presence requirement in Treasury Regulation § 1.401(a)-(21)(d)(6) for participant elections required to be witnessed by a plan representative or a notary public, including spousal consent required under § 417 of the Internal Revenue Code.

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC's members are leaders in every industry sector and provide comprehensive retirement and health benefits to tens of millions of active and retired workers and their families across the country. As such, ERIC has a strong interest in policies that impact employers' ability to administer retirement programs and the ability of employees and retirees to receive such benefits.

We appreciate the work of the Treasury and IRS during the COVID-19 pandemic and your responsiveness in helping plan sponsors best serve their employees during this period of uncertainty. As plan sponsors continue to address pandemic issues and work toward preparing their workforces for the future, ERIC asks Treasury and IRS for permanent guidance on the implementation of remote notarization for retirement plans. The agencies have extended temporary relief through guidance, from the initial relief through December 31, 2020, to an extension granted through June 30, 2021, to now relief through June 30, 2022. Plan sponsors continue to utilize remote notarization, finding it to be efficient, secure, and reliable. Accordingly, ERIC believes it is appropriate to make the guidance in Notice 2021-40 permanent.

Remote Notarization is a Secure Option. Plan sponsors take their obligations to participants seriously, and care deeply about security and fraud prevention. Remote notarization programs utilize security and safety technology to protect participants and spouses from fraudulent activity and potential abuses. Such safety measures include secure identity proofing technologies such as multi-factor authentication, known as knowledge-based authentication (KBA). KBA requires that participants answer a series of computer-

generated questions based on their personal history in order to proceed with the notary process.¹ Because participants currently experience KBA outside of the retirement process, such as with email accounts, they are familiar with this safe practice that is currently utilized in remote notarization.

Credential analysis is also one of the primary practices of remote notarization. It includes examining a person's face and valid photo identification in real-time video and confirming the information through automated software to ensure participant validity.²

These methods mitigate risk by creating a robust digital audit trail. These current practices and protections that are included in state rules are also included in Notice 2021-40. For these reasons, remote notarization is a secure platform for plan sponsors and employees and should be made a permanent option in retirement plan administration.

States Have Securely Established Remote Notarization Practices. Remote notarization is not a new practice and was being used before the COVID pandemic. According to the National Association of Secretaries of State, there are currently 33 states that have passed permanent legislation for notaries to perform online remote notarizations; additionally, 47 states and Washington D.C. authorize remote notarization either through an existing law or emergency action.³ Most states implemented their remote notarization laws between 2015 and 2019, showing that there was already a growing trend to use remote practices.⁴ The number of permanent laws is likely to increase as momentum grows in support of remote notarization as a commonsense and secure authentication method.⁵

Further, the applicable 2006 Treasury regulations contemplated that remote notarization would eventually be widely available and 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 deem 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.

Remote Notarization Brings A 21st Century Approach to Participants. Remote notarization provides additional flexibility for many participants and beneficiaries by using technology that is now common. The permanent authorization of remote notarization will expand opportunities for those that have mobility challenges, health concerns, demanding work schedules, or who travel for extended periods of time for work. The option of remote notarization allows participants and beneficiaries to quickly notarize retirement documents without the burdens of in-person notarization, such as planning extra time for travel, taking time off from work, or arranging childcare. These benefits will not disappear when the pandemic abates.

¹ Thun, D. "How Do You Identify Signers For A Remote Online Notarization?" National Notary Association, <https://www.nationalnotary.org/notary-bulletin/blog/2020/04/identify-signers-remote-online-notarization> (2020).

² *Id.*

³ National Association of Secretaries of State, "Remote Electronic Notarization" (2021) <https://www.nass.org/initiatives/remote-electronic-notarization>.

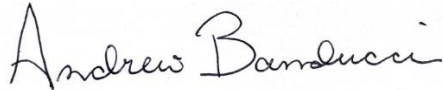
⁴ *Id.*

⁵ Remote notarization is used for a variety of documents under state laws and not just for spousal consent related to retirement plans.

Conclusion

ERIC appreciates the work that has been done to ensure that retirement benefits remain protected throughout the pandemic. As technology and the workforce evolve, ERIC believes that remote notarization should be made a permanent option for retirement plans. Thank you for your consideration of our views. Please do not hesitate to contact me if you have any questions or would like to discuss further.

Sincerely,

A handwritten signature in black ink that reads "Andrew Banducci". The signature is written in a cursive style with a large initial 'A'.

Andrew Banducci
Senior Vice President
Retirement and Compensation Policy