

Submitted Electronically

CC:PA:LPD:PR (REG– 114666–22)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

**Re: Use of an Electronic Medium To Make Participant Elections and Spousal
Consents (RIN 1545-BQ50)**

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to comment on the proposed rulemaking (Proposal or Proposed Rule) by Internal Revenue Service (IRS) titled “Use of an Electronic Medium to Make Participant Elections and Spousal Consents.”¹ We support the proposed rule, which would allow for permanent relief from the physical presence requirement in Treasury Regulation Sec. 1.401(a)-(21) for participant elections required to be witnessed by a plan representative or a notary public, including spousal consents required under Section 417 of the Internal Revenue Code (Code).

ERIC is a national nonprofit organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans.

Americans engage with an ERIC member company many times a day, such as when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage or snack, use cosmetics, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, or go shopping.

ERIC member companies sponsor retirement plans, including both defined benefit and defined contribution plans, that are governed by the *Employee Retirement Income Security Act of 1974*, as amended (ERISA) and the Code. Because millions of workers and retirees participate in these plans, ERIC has a strong interest in rules that promote efficient plan administration.

¹ 87 Fed. Reg. 80501 (Dec. 30, 2022).

ERIC Supports the Proposed Regulation Because It Modernizes Plan Administration Without Jeopardizing Participant Security

The Proposal modernizes plan administration requirements by permitting secure remote witnessing or notarization of certain participant elections. Treas. Reg. Sec. 1.401(a)-(21) sets forth requirements that apply to retirement plan participants using an electronic medium to make elections about their retirement benefits. Some elections, such as an election to take certain distributions or plan loans from a plan subject to the qualified joint and survivor annuity and qualified preretirement survivor annuity rules, must include spousal consent. That consent must be “in writing” and witnessed by a plan representative or notary public.² Under the regulations, the signature of the person making the election must be witnessed in the “physical presence” of the plan representative or notary public;³ but the IRS is authorized to provide guidance regarding electronic procedures that could satisfy the physical presence requirement.⁴

Throughout the COVID-19 pandemic, the IRS provided temporary relief from the physical presence requirement. The relief permitted remote witnessing of spousal consents for plan distributions and loans. This temporary relief was extended a number of times, ultimately spanning the period between January 1, 2020, through December 31, 2022.⁵

ERIC strongly supported the temporary relief and requested that IRS make the relief permanent.⁶ As detailed in our previous letters, our member companies support the relief for several reasons.

First, the Proposal would provide a measure of flexibility for participants and beneficiaries. For example, the use of video conferencing technology expands opportunities for those with mobility challenges, health concerns, demanding work schedules, or who travel for extended periods of time for work. It eliminates the need to travel or arrange childcare. In short, it provides more options and reduces barriers to making the relevant elections.

Second, the technology used is secure. Plan sponsors take their obligations to participants – including spouses – seriously, and care deeply about security and fraud prevention.⁷ Remote notarization and witnessing programs utilize security and safety technology to protect participants and spouses from fraudulent activity and potential abuses. The methods mitigate risk

² Code Sec. 417(a)(2)(A).

³ Treas. Reg. Sec. 1.401(a)-(21)(d)(6)(i).

⁴ Treas. Reg. Sec. 1.401(a)-(21)(d)(6)(iii).

⁵ See Proposal, *supra* note 1, at 80502 (reciting the history of the temporary relief).

⁶ See, e.g., Comment Letter of The ERISA Industry Committee regarding Notice 2021-03, *available at* <https://www.eric.org/wp-content/uploads/2021/04/Remote-Notarization-Letter-ERIC-April-23-2021.pdf> (April 23, 2021); Comment Letter of The ERISA Industry Committee regarding Notice 2021-40, *available at* <https://www.eric.org/wp-content/uploads/2021/09/Notice-2021-40-Comments-FINAL.pdf> (Sept. 30, 2021); Letter from Various Organizations to Ms. Rachel Levy, *available at* <https://www.eric.org/wp-content/uploads/2022/11/Remote-Notarization-11.2022.pdf> (Nov. 30, 2022); Comment Letter from Various Organizations on RIN 1545-BQ50, *available at* <https://www.eric.org/wp-content/uploads/2023/03/3-10-23-Final-Group-RON-Comment-Letter-spousal-consent.pdf> (Mar. 10, 2023).

⁷ In this regard, we note that, as drafted, the Proposal appears to only apply to spousal consent that is *required* by the Code. IRS should clarify that compliance with the rules in the Proposal, if finalized, constitutes a safe harbor if a plan requires spousal consent for additional elections.

by creating a robust digital audit trail and are reflected both in state rules and the Proposal. Further, this technology has now been available for use by retirement plans for nearly three years, and we are not aware of evidence of widespread fraud or other security-based concerns.

New Recording Requirement for Plan Representatives Requires Clarification

Under the Proposal, a spousal consent witnessed by a plan representative must meet five separate requirements:

1. A valid photo ID presented by the person signing the spousal consent to the plan representative during the live audio-video conference;
2. The live audio-video conference must permit direct interaction between the plan representative and the person signing the consent;
3. The person signing the consent must electronically transmit a legible copy of the signed document to the plan representative on the same date as the signature;
4. The plan representative must acknowledge that the signature was witnessed by the representative and transmit the signed spousal consent back to the person signing the consent; and,
5. A recording of the audio-visual conference must be made by the plan representative and retained by the plan.

The first four of these requirements are similar to the terms required by the earlier relief notices, but the fifth requirement is new. We do have some concern that this new recording requirement will raise complications for plan representatives under state laws. For example, states have varying laws regarding whether one or both parties are required to consent to recordings.⁸ Large employer plans may have plan representatives both located in different states and servicing participants located in different states. By contrast, notaries public are located in a particular state and subject to that state's laws. This new requirement will add complexity, and the IRS has not explained the need for this requirement. If this requirement is retained in the final rule, additional guidance is necessary.

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.

⁸ See, e.g., Digital Media Law Project, "Recording Phone Calls and Conversations," available at <https://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations>.

Sincerely,

Andrew Banducci