

IRS Proposes to Permanently Allow Remote Witnessing of Spousal Consents

On December 29, 2022, the IRS issued proposed regulations that would permanently allow retirement plans to accept remote participant elections and spousal consents.

Proposed Regulations Stem From the COVID-19 Pandemic

These proposed regulations are not altogether new. They first came about during the COVID-19 pandemic at a time when social distancing demanded an alternative to the physical presence requirement. Before the pandemic, the IRS required that spousal consent for retirement plan distributions be signed in the physical presence of a notary or plan representative. The IRS is now proposing to make permanent the temporary relief from the physical presence requirement it issued during the pandemic. Specifically, spousal consents and certain participant elections will continue to be permitted via an electronic medium.

Important Dates

Plans have been permitted to accept remote witnessing for nearly two years. Just two days before the temporary relief was set to expire on December 31, 2022, the IRS issued the proposed regulations that would make the temporary relief permanent.

The proposed regulations are subject to a public comment period that closes on March 30, 2023. For ease of plan administration, the IRS has stated that the proposed regulations can be relied on until the effective date of any final regulations.

Remote Witnessing is Optional

Importantly, plan administrators are not required to permit remote witnessing. However, if a plan permits remote witnessing, it must also permit in-person witnessing.

Requirements to Preserve Integrity of Election and Consenting Process

To calm the nerves of critics and to ensure the authenticity of benefit elections and spousal consents, the IRS built several requirements into the proposed regulations to safeguard the integrity of the online witnessing process. Regardless of whether the witnessing is done by a notary public or a plan representative, the following requirements must be satisfied:

1. The spouse's signature is witnessed via live audio-video technology; and
2. The electronic process satisfies the basic requirements for online participant elections, which include:
 - a. Individuals are able to effectively access the electronic medium;
 - b. The electronic system is reasonably designed to ensure that only the appropriate individuals (e.g., the participant or the spouse) are able to make the election;
 - c. The electronic system provides individuals with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election before it becomes effective; and
 - d. The individuals must, within a reasonable time, receive written or compliant electronic confirmation of the effect of their election.

If the witness is a notary public, the process must comply with State law notary requirements. If the witness is a plan representative, the following additional requirements apply for spousal consents:

1. The spouse presents a valid photo ID during the live audio-video conference;
2. The live audio-video conference allows for direct interaction between the spouse and the plan representative (i.e., pre-recorded videos of the signing are not permitted);



Jay A. Dorsch

**Chair,
Employee
Benefits and
Executive
Compensation**

jdorsch@cozen.com
Phone: (215) 665-4685
Fax: (215) 701-2385



Jenna Schaffer

Associate

jschaffer@cozen.com
Phone: (215) 665-4679
Fax: (215) 372-2396

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3. The spouse electronically transmits their legible signature to the plan representative on the same date that the signature occurs;
4. The plan representative acknowledges the witnessing and electronically transmits the signed spousal consent and acknowledgement back to the spouse and provides notice that a free paper copy is available; and
5. The plan representative records the audio-video conference with the spouse and retains that recording in compliance with the rules regarding plan document retention.

Next Steps for Plan Administrators

If plan administrators choose to offer remote witnessing, they should work with their counsel to ensure the plan meets the requirements under these proposed regulations and that the notarization procedures satisfy relevant State law.

If you have any questions, please do not hesitate to contact a member of the Cozen Employee Benefits and Executive Compensation Group.
