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CC:PA:LPD:PR (REG-114666-22)

Room 5203

Internal Revenue Service

PO Box 7604

Ben Franklin Station

Washington, DC 20044

Re: Proposed Regulations on Use of an Electronic Medium to Make Participant Elections and Spousal Consents (REG-114666-22)

The SPARK Institute strongly supports the above-referenced proposed regulations issued by the Internal Revenue Service and the Department of the Treasury (collectively, “the Service”) to modernize the regulations under which retirement plan participant elections and spousal consents may be undertaken electronically. The proposal represents a common sense improvement to plan administration that fully protects participants and spouses, and offers choices for plan sponsors.

The SPARK Institute represents retirement plan recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms, and investment managers. Collectively, our member firms administer the retirement plans for over 100 million American workers.

The proposal would permanently permit remote witnessing as an alternative to physical witnessing for spousal consents. Under the proposal, and generally consistent with the Service’s temporary relief originally announced in Notice 2020-42 (and subsequently extended three times), there would be two alternatives for remote witnessing: (1) remote notarization consistent with state laws allowing for that procedure and (2) remote witnessing by a plan representative using live audio-video technology and following additional procedures.

As noted below, we do have some comments on the new proposed “Example 3” in the regulation.

Remote Witnessing and Notarization Protects Participants and Spouses

Remote witnessing worked well during the pandemic, allowing retirement plan participants to access their benefits without unnecessarily jeopardizing their health by physically meeting with a notary public or plan representative. These personal and public health benefits, however, have not been the only benefits of using remote witnessing. Specifically, remote witnessing has proven, under the Service’s temporary relief, to be more convenient and just as secure (and in some cases more secure) than physical witnessing.

Security. Remote witnessing creates a secure environment for spousal consents, which is as or more secure than physical witnessing. Just like physical witnessing, remote witnessing provides real-time third-party identity verification by visually comparing a person’s face with a valid photo ID indicating that the person is who they claim to be. However, unlike most physical witnessing, remote witnessing can also easily be recorded and create an electronic audit trail. In the case of plans that use a remote online notarization service, plan sponsors can utilize additional levels of fraud prevention that cannot be incorporated into a physical witnessing process. For example, remote online notarization services generally use multi-factor authentication through two forms of identity proofing, including knowledge-based authentication and credential analysis. This provides additional protection for spouses for whom the plan may not have an existing relationship.

SPARK members now have more than two years of experience with remote witnessing. Since the Service first announced its temporary relief from the physical presence requirement, retirement plan service providers have relied on remote online notarizations and witnessing tens of thousands of times. We have continued to ask SPARK members if they are aware of a single instance of fraud or spousal coercion that can be tied to the use of remote online notarizations or witnessing. And we have yet to hear of a single such instance, and certainly no evidence that remote witnessing is *systematically* less protective.

Since the Service first provided temporary relief for remote witnessing and notarization, some groups have submitted comments asserting, without evidence, that relief from the physical presence requirement will result in a substantial increase in fraud or abuse. They have offered unsupported speculations or anecdotes, at best. But SPARK members have *actual experience* with tens of thousands of spousal consents conducted via remote witnessing and notarization.¹ They can confirm that they see no evidence of increased fraud or abuse, or increased risk of fraud or abuse.

In preamble to the proposal, the Service reports on a few new speculative arguments advanced by these groups for why there will be increased fraud. For example, these groups suggest that if a plan representative reviews an ID in person, the plan representative will be able to detect the absence of ID security features. They also suggest that a webcam’s “field of vision is narrow” and imagine nefarious figures right off camera coercing spouses into agreeing to a lump sum distribution.

¹ In the preamble, the Service reports that “in response to statements by commenters that there has been no evidence of fraud during the period of the temporary relief granted under the temporary relief notices, opponents of remote witnessing for spousal consents argued that it usually takes many years for evidence of fraud to surface and that investigating and resolving allegations of fraud can take years.” We disagree; with tens of thousands of consents performed, we would have some evidence of problems by now. The pandemic began almost three years ago. And even before the pandemic, remote notarization was gaining acceptance in states. After all, since remote notarization was first adopted in 2011, more and more states, not fewer, have adopted it, because it has been demonstrated to be as secure as in-person notarization. In any event, to the extent that the Service takes such speculative worries seriously, we would point out that the regulatory change being proposed is not forever set in stone. Should the Service uncover new evidence of *widespread* increased spousal coercion that could have been prevented by an in-person witnessing, the Service can always put in place new restrictions.

No method of obtaining spousal consent prevents *all* possible fraud or coercion: in-person witnessing or notarization certainly cannot. Once one begins to imagine shadowy figures off camera, it is just as easy to imagine a spouse performing a notarization at a UPS store while someone who threatened the spouse waits in the car. Or one can imagine a plan representative conspiring with a participant to fake a spousal consent (which would be much more difficult if there was an audio-video recording that could be reviewed later).

We want to make the important point that SPARK members feel just as strongly as these groups of the need to ensure participant elections and spousal consents are freely given and done on an informed basis. Plan sponsors and service providers have a significant interest in preventing fraud or coerced spousal consent. Even if the plan sponsor or service provider followed their procedures, it is very disruptive when a payment is made from a plan without the full consent of the participant and, if required, the spouse. This is why the SPARK Institute and its members have put significant time and energy into best practices on cybersecurity and fraud.²

Convenience. Remote witnessing is undoubtedly a less burdensome and more convenient alternative to physical witnessing for those participants who are comfortable using face-to-face online video communications tools. Companies that have made remote witnessing available during the pandemic have consistently found that their customers appreciate the additional convenience. Moreover, companies incorporating remote witnessing have found that it offers a quick and secure alternative to conventional physical witnessing. As the Service reports in the preamble, the average remote notary session takes less than eight minutes from start to finish.

As plan administration has increasingly harnessed electronic technologies to reduce cost and improve the user experience, retirement plan sponsors and their service providers have been able to deliver a convenient and seamless user experience. Remote witnessing is another step forward in that regard. This does not mean that electing benefits or changing beneficiaries is or should be a “one-click” process. The spousal consent process ensures deliberation, and remote witnessing has built-in safeguards similar to physical witnessing.

Even as the pandemic has receded from impacting our lives, the increased convenience of remote witnessing is still beneficial in many contexts. For example, when plan participants request distributions following natural disasters or medical emergencies, remote witnessing offers a secure and convenient option for these participants who may find it difficult to physically travel. Remote witnessing also is beneficial to both participants and/or spouses who may have physical limitations and those living in more remote areas.

Permanent relief would allow these plans and providers to build permanent and integrated systems that meet their plan sponsor and participant expectations – *i.e.*, through a fully electronic and virtual environment, without the need for physical witnessing. This type of permanent integration would help to improve the participant experience by making it more convenient and seamless.

² See <https://www.sparkinstitute.org/resources/cybersecurity-and-fraud-resources/> for a catalog of industry best practices developed by the SPARK Institute’s Data Security Oversight Board.

Changing Nature of Work. The pandemic has made clear that the nature of work is changing, and increasingly employees will work from home or in another location that is not near a plan representative. This is consistent with a continuing trend in electronic administration and recordkeeping of retirement plans. The Service itself went remote during the pandemic, and continues to offer many opportunities for employees to work remotely. Updating the rules for witnessing spousal consent to reflect the changing nature of employment – with appropriate safeguards – fulfills Congress’ direction more than 20 years ago that “a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.”³

Perhaps the best evidence that it is perfectly appropriate to perform important transactions using online live audio-video technology is that ***the public hearing that has been scheduled for this proposal will be remote.*** We know that the Service believes that doing a virtual hearing protects the rights of the public to be fully heard.

Allowing Remote Notarization Respects State Laws

Both the Code and ERISA have, for decades, incorporated the concept of witnessing by a notary public.⁴ In other words, Congress decided that state laws which govern and regulate notaries public provide the kind of protection that is needed for spousal consents that are not witnessed by a representative of the plan. Notaries public perform a variety of important roles as an impartial witness in official fraud-deterrent acts related to the signing of important documents. Witnessing spousal consents to retirement plan elections or beneficiary designations is small part of that role. And because notaries public are official representatives of a state, each state’s regulatory body (typically the secretary of state) has an important public interest in ensuring notarizations are performed in circumstances where the signers of important documents are screened for their true identity, their willingness to sign without duress or intimidation, and their awareness of the contents of the document.

In 2006, when the current regulations now being amended were finalized, remote online notarization was a new concept, without widespread acceptance by states. Thus, the 2006 regulations required the consent to occur in the physical presence of the notary. In 2011, Virginia was the first state to adopt remote notarization, and now the vast majority of states allow notarization to occur under regulated procedures. According to the National Notary Association, 43 states have now passed remote notarization laws.⁵ In the states, remote notarization is bipartisan and largely uncontroversial. The states that allow for remote notarization run the gamut from “red” states such as Texas and Wyoming to “blue” states such as Illinois and New York.

Of course, a few states do not allow for remote notarization, and states that allow for it impose slightly different requirements on notaries. But just like other areas that are the province of state

³ Electronic Signatures in Global and National Commerce Act § 101(a)(1).

⁴ Code section 401(a)(11); ERISA section 205(c)(2)(A)(i).

⁵ <https://www.nationalnotary.org/notary-bulletin/blog/2018/06/remote-notarization-what-you-need-to-know> (visited March 19, 2023).

legislators and regulators, slight differences in regulation of notaries simply reflect different rational choices by states. The proposal, appropriately in our view, requires that the remote witnessing is consistent with State law requirements that apply to the notary public. The proposal, as with the very concept of relying on state-regulated notaries, reflects the reality that the Service is not expert in the intricacies of this area overseen by state regulators, and allows for changes in state requirements from time to time.

The Proposal Strikes the Right Balance

In the preamble, the Service acknowledges that there are strongly held views both in support of and in opposition to remote witnessing. While the SPARK Institutes believes that remote witnessing and notarization is fully protective of participant and beneficiaries, and in many cases *more* protective than in-person witnessing, we acknowledge that views on the other side are based on sincere desire to protect spouses, especially women.

The proposal includes new safeguards that did not exist under the temporary relief. For example, if a spousal consent is witnessed remotely by a plan representative, the audio-video interaction must be recorded and retained by the plan in accordance with Code section 6001. The proposal also makes clear something implicit in the temporary relief, namely that a plan cannot *force* a participant or spouse to make elections or consents using remote notarization—the plan must accept an in-person notarization. Finally, the proposal specifically provides that the special rules in the existing regulation for electronic participant elections apply to spousal consents.

We strongly believe that the Service has struck the right balance in the proposal. The proposal allows plan sponsors to offer a cost-effective and convenient method for spousal consent that reflects the remote nature of work and increased acceptance of conducting important transactions electronically. But the proposal includes a number of protections for participants and spouses that were contained in the temporary relief, and even builds on those protections. As the Service points out, many of the protections in the proposal were suggested both by commenters supporting and by commenters opposing remote witnessing.

Example 3 Should be Clarified or Modified

In connection with the new proposal, the Service has proposed to modify Example 3 in the regulation, which involves a loan under a money purchase plan. We have concerns that the new example applies the rules in the regulation incorrectly and will cause confusion. Part of the confusion is that the modified example *does not involve a remote electronic spousal consent*.

First, part (A) of the example could be understood to require that a spousal consent form must be *separate* from the regular loan paperwork. Plans often include spousal consent as part of the paper or electronic materials provided to participants. We would ask the Service to clarify that this example is simply an example and does not imply that spousal consent must be provided separately from other loan or distribution materials.

Second, and more concerning, the example seems to interpret the requirements for spousal consent incorrectly. The example involves a situation in which a spouse consents to the loan in

the physical presence of a notary public. This form is then scanned and uploaded to the plan website. But part (B) of the example states something confusing. It states as part of the facts: “Using the email address provided on the spousal consent form, Plan C also sends an email to Participant M’s spouse that attaches the signed spousal consent and gives Participant M’s spouse a specified reasonable period of time to review and confirm the spousal consent and to determine whether the spousal consent should be modified or rescinded. The email also notifies Participant M’s spouse that Participant M’s spouse may request a written paper copy of the signed spousal consent and that, if Participant M’s spouse requests a written paper copy of the signed spousal consent, it will be provided at no extra charge.”

This example implies that when a spouse consents to a loan (or distribution) on paper, and this paper is scanned for transmission to the plan, that the spouse must be given *another* chance to review the consent, which apparently would not be required if the participant mailed the completed spousal consent form to the plan administrator. Although the example does not explain why this would be the case, we assume the reason is that the regulations require that if spousal consents are performed electronically, “[t]he electronic system used in making a participant election or spousal consent must provide the person making the election or consent with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election or consent before the election or consent becomes effective.”

Providing a chance to “review, confirm, modify or rescind” the terms of the consent makes sense when the spouse is *actually consenting electronically*. For example, just like every online store’s “confirmation” page, the electronic system could have a screen at the end that shows the spouse the information that was entered and gives the spouse one last change to review and confirm the information (or decide not to proceed).

But in the example in the proposal, the spouse is consenting *on paper*, so we do not believe that the special rules for electronic consents are applicable solely because the paper consent is transmitted or stored electronically. And applying them here does not make any sense: The example notes that the spouse can request a paper copy of the signed consent, but the spouse does not need to ask for a paper copy of the spousal consent, because the spouse *has the original paper document*.

In short, we recommend that the final regulations modify, clarify, or remove Example 3. For example, one approach may be to focus on an example actually involving remote witnessing of spousal consent.

We Support the Proposed Applicability Date

Our previous comments on this issue have pointed out that the current Treasury regulations expressly authorize the Service to make available permanent relief from the physical presence requirement without notice and comment rulemaking.⁶ The Service has nonetheless decided to make this change via an amendment to the regulation, which also makes other clarifying changes to the regulation.

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


We support the approach that the Service has taken. The Service felt that making this change permanent was best accomplished through a regulatory proposal that allowed for notice and comment. At the same time, the Service provided that prior to the applicability date of the final regulation, taxpayers may rely on the rules set forth in the proposal. Since the proposed rules are very similar to the temporary relief (although do impose some additional common sense protections), the approach the Service took avoided a temporary gap in relief which would have required plans and service providers to abruptly stop offering remote witnessing only to start it up again. At the same time, the Service offered the regulated community a chance to provide formal input, and provided a sufficient time for comments.

The Service has proposed to apply the amended regulation beginning on the date that is six months after publication of the final regulation in the Federal Register. Because the new rules are largely optional, plans and their service providers will be able to take the time they need to implement remote notarization or remote witnessing under the final rules. The proposal does include some clarifications of the application of the current rules to spousal consents, but, with one caveat, we believe that these are already incorporated into procedures or will not be hard to incorporate. The caveat is that, as noted above, proposed Example 3 implies a process for processing spousal consents that, we believe, is not how plan loans are currently administered. If the Service clarifies the example in a way that requires a rework of how loans are processed, we will need 24, not six, months to make those changes.

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The SPARK Institute appreciates the opportunity to provide these comments. If you have any questions or would like more information regarding this letter, please contact the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com).

We will be submitting a request to testify in a separate letter.

Sincerely,

Tim Rouse
Executive Director