

Law &amp; Policy Group

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# IRS proposes permanent physical presence relief for spousal consent

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An IRS [proposal](#) issued in the waning days of 2022 would permanently allow live audiovisual conferencing for witnessing spousal consents in retirement plans. The proposal updates the agency's regulation governing electronic participant elections, which currently require the physical presence of a notary public or other plan representative for spousal consents. IRS has granted immediate reliance on the proposal, which has a few substantive changes — including an apparent narrowing of the scope — from the 2020 [temporary relief](#) that [expired](#) Dec. 31, 2022. Comments are due March 30.

## Proposal includes additional protections

Like the temporary relief, the proposal allows retirement plans to accept spousal consents witnessed remotely by a notary public (in accordance with state law) or a plan representative, subject to certain conditions. In response to comments on the temporary relief, the proposal includes a few changes meant to provide additional protections.

### Plans can't require remote notarization

The proposal clarifies that plans don't have to accept remote notarization, but plans that do must also accept spousal consents witnessed in the physical presence of a notary public. The requirements for remote notarization are substantively the same as in the temporary relief: A notary public can witness spousal consents using live audiovisual conferencing if the remote witnessing satisfies IRS rules for participant elections using electronic media and all state requirements applicable to the notary public.

### Recording required when plan representative is witness

For spousal consents witnessed by a plan representative, the proposal retains four conditions laid out in the temporary relief and adds a fifth: The witnessing plan representative must record the conference and retain the recording. IRS added this requirement as an extra safeguard against fraud and spousal coercion — a particular concern when spouses may have conflicting interests.

A plan representative can witness a spousal consent election if the following requirements are satisfied:

- The individual signing the election must show a valid photo ID to the plan representative during the conference — sending a copy of the ID before or after the conference is not sufficient.
- The conference must allow for direct interaction between the individual and the plan representative — a prerecorded video of the person signing is not sufficient.
- On the same day the document is signed, the individual must send a legible copy by fax or other electronic means directly to the plan representative.
- The plan representative must return the document to the individual — using an electronic system the individual is effectively able to access — with an acknowledgment of having witnessed the signature.
- The plan representative must record the audiovisual conference and retain a copy of the recording in accordance with IRS rules.

## Existing rules for participant elections apply to spousal consents

The proposal clarifies that IRS's special rules for electronic participant elections also apply to spousal consents made electronically:

- The spouse must have the effective ability to access the electronic medium used to give consent.
- The electronic system must be reasonably designed to preclude any person other than the spouse from giving the consent.
- The spouse must have the opportunity to review, confirm, modify or rescind the consent before it becomes effective.
- Within a reasonable time, the spouse must receive a confirmation of the effect of the consent.

## Scope of the proposal

The scope of the proposal appears narrower than IRS's earlier temporary relief, which applied to any participant election (including a spousal consent) requiring an individual's signature to be witnessed in the physical presence of a plan representative or notary. In contrast, the proposal's remote-witnessing provisions expressly apply to written spousal consents meeting the requirements of Internal Revenue Code Section 417(a)(2)(A) for waiving spousal death benefits. The proposal doesn't explain whether plans requiring other participant elections (or spousal consents) to be notarized or witnessed by a plan representative may use these rules as a safe harbor. IRS clarification would be helpful.

## Related resources

### Non-Mercer resources

- [Proposed regulations](#) (Federal Register, Dec. 30, 2022)
- [Notice 2020-42](#) (IRS, June 3, 2020)

### Mercer Law & Policy resources

- [IRS OKs witnessing retirement plan elections, spousal consent by video](#) (Dec. 29, 2020)

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