



## Rewards Policy Insider 2022-11



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## IRS Provides Another 6-Month Extension of Remote Notarization for Spousal Consent

Remote notarization for spousal consent relating to certain qualified plan distributions will continue to be

available through the end of 2022, pursuant to IRS Notice 2022-27. This extends the prior relief under Notice 2021-40, which was set to expire on June 30, 2022.

## Overview

In certain cases, qualified retirement plan participants who are married are prohibited from designating a non-spouse beneficiary or receiving a distribution in any form other than a qualified joint and survivor annuity ("QJSA") unless: (1) the participant's spouse provides consent; and (2) such consent is witnessed by a plan representative or a notary public. Under existing IRS regulations, a spouse may provide this type of consent electronically and a notary may provide electronic notarization. Generally, when electronic media is used for these purposes, IRS regulations require any spousal consent to be "witnessed in the physical presence of a plan representative or a notary."

The COVID-19 pandemic made this "physical presence" requirement difficult, if not impossible, to satisfy. That is what prompted the IRS to issue the initial temporary relief in Notice 2020-42, which was then extended by Notice 2021-03 and Notice 2021-40.

As before, the relief is conditioned on meeting the requirements of Notice 2021-03, either by using an online remote notary or by having a plan representative do something similar via audio/visual remote witnessing. See [Rewards Policy Insider 2021-13](#) for additional details.

## Outlook

The Notice cites the ongoing COVID-19 pandemic to justify the additional 6-month extension. But it also states that "recent easing of public health precautions relating to the COVID-19 pandemic" means a further extension beyond the end of 2022 "is not expected to be necessary." As such, the temporary relief may lapse at the end of this year.

However, Notice 2021-40 requested comments on whether the temporary relief should be made permanent or the "physical presence" requirement should otherwise be modified. Notice 2022-27 states the IRS is still reviewing the stakeholder input it received. It also provides that if the physical presence requirement is changed, the change will occur through the regulatory process, offering the opportunity for further comment.

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## House Committee Approves Bill that would Expose ERISA Plans to More Litigation

Well-drafted ERISA retirement and health and welfare benefit plans typically include a clause specifically reserving to the plan administrator discretionary authority to interpret the plan's terms. These clauses, which generally lead to courts deferring to the plan administrator's interpretation when disputes over

ambiguous plan terms arise, would no longer be valid in single-employer plans pursuant to the “Mental Health Matters Act” (H.R. 7780), a bill approved by the House Committee on Education and Labor on May 18. Even though the bill is broadly focused on enhancing federal support for mental health care and services, this and other ERISA changes included in the bill would likely expose all types of ERISA plans to more litigation.

## Overview

When ERISA plans include these discretionary clauses, courts apply an “arbitrary and capricious” standard of review in disputes involving the interpretation of ambiguous plan terms, such as whether a group health plan covers a particular benefit or how a participant’s pension benefit is to be calculated. That means the court generally will defer to the plan administrator’s interpretation unless it finds it to be “arbitrary and capricious.” The alternative is a *de novo* standard of review, which effectively allows the court to disregard the plan administrator’s interpretation.

H.R. 7780 would amend ERISA to essentially require courts to apply only the *de novo* standard of review to these cases if a single-employer or multiple employer plan is involved. The bill would continue to allow multiemployer plans to include discretionary clauses if they want to take advantage of the “arbitrary and capricious” standard of review.

Also of note, the bill would prohibit ERISA plans from enforcing pre-dispute arbitration provisions designed to prevent participants from pursuing ERISA remedies in federal court. Post-dispute arbitration agreements would still be permitted if certain requirements are met.

Finally, the bill would prohibit ERISA plans from enforcing class action waivers.

## Outlook

The provisions described above would apply to all ERISA plans and – in spite of the bill’s name – would not in any way be limited to mental health benefits.

Whether H.R. 7780 will be voted on by the full House is an open question. However, it almost certainly will not be acted on by the Senate, where bipartisan support would be needed. The Education and Labor Committee’s vote was straight party line, with all Democrats in favor and all Republicans opposed.

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## Senators Write Letter Scrutinizing 401(k) Investments in Bitcoin

Senators Elizabeth Warren (D-MA) and Tina Smith (D-MN) raised concerns about adding the virtual currency

Bitcoin to 401(k) investment menus, in a letter sent to a financial services provider in early May.

## Background

A financial services provider announced in April that it plans to enable individuals to have a portion of their retirement savings allocated to Bitcoin through their 401(k) plan investment lineup. The company is among the first to allow 401(k) plans to invest in cryptocurrency such as Bitcoin. The announcement came on the heels of the Department of Labor (“DOL”) releasing Compliance Assistance Release (“CAR”) 2022-01 on March 10, 2022. CAR 2022-01 addresses 401(k) plan investments in cryptocurrencies and cautions plan fiduciaries to exercise “extreme care” before they add a cryptocurrency option to a 401(k) plan’s investment menu. In CAR 2022-01, the DOL states that such investments are speculative and subject to extreme price volatility, the accurate valuation of cryptocurrency is challenging and complex, and plan participants are less likely to have sufficient knowledge or expertise about such investments when compared to traditional investments.

## Letter from Senators

On May 4, 2022, Senators Elizabeth Warren and Tina Smith sent a letter to the CEO of the financial services provider, inquiring about the “appropriateness” of the company’s decision to add Bitcoin to its 401(k) investment plan menu and referencing the “serious concerns” about cryptocurrency raised by DOL in CAR 2022-01. In particular, the Senators expressed concern about cryptocurrency’s volatility, citing to large drops in value and the risk of cryptocurrency being subject to the whims of celebrity figures like Elon Musk. The Senators also raised concerns about the financial service provider’s potential conflict of interest—the company announced in 2017 that it was mining cryptocurrency—which, the Senators wrote, could have affected the decision to offer Bitcoin in its investment menu.

The Senators asked the company to follow up with answers to several questions, such as: what risks does the company believe that Bitcoin presents to its customers; what fees will the company’s customers incur if they decide to invest in Bitcoin; and how will the company address Bitcoin risks in light of CAR 2022-01.

## Outlook

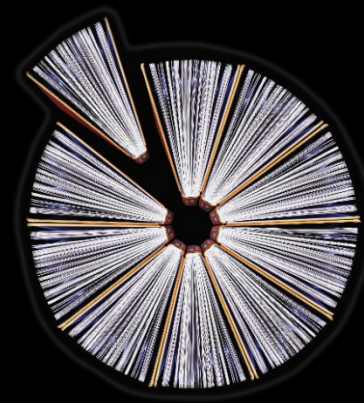
The rising popularity of cryptocurrency investing, coupled with growing concern from regulators and lawmakers about such investments, means that issues surrounding investments in cryptocurrency will not die down anytime soon. The Senators’ letter and the company’s anticipated response to their questions are even more timely considering the news that Bitcoin and several other cryptocurrencies have recorded large losses in recent weeks.

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