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MEMORANDUM

TO: Retirement Fund Clients

FROM: Slevin & Hart, P.C.

DATE: August 4, 2021

RE: Extension of Temporary Relief from Physical Presence Requirement for Participant Elections

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Generally, the Internal Revenue Code requires that certain participant elections and spousal consents required by retirement plans must be signed in the physical presence of a plan representative or a notary public. For defined benefit plans, the most common circumstance requiring this procedure is when a married participant retires and makes an election for a form of benefit other than a qualified joint and survivor annuity. For defined contribution plans, this process is required when the married participant seeks to name a beneficiary other than the spouse to receive the balance of the account upon the participant's death.

As discussed below, in response to the ongoing challenges presented by the COVID-19 pandemic, the IRS has provided temporary relief from the physical presence requirement for these participant and spouse elections and has continued to extend this relief. The relief also applies to any other participant election for which the Code ordinarily requires the participant's physical presence when signing an election form, including COVID-19 related distributions and plan loans permitted under the CARES Act.

Under the relief, elections still must be witnessed by a notary public or a plan representative. However, the relief provides alternative methods to satisfy the notary or witness requirement remotely. The relief currently extends through June 30, 2022.

1. Guidance Establishing Relief

On June 3, 2020, the IRS issued Notice 2020-42 first offering this temporary relief from the physical presence requirements from January 1, 2020 through December 31, 2020. On December 23, 2020, the IRS issued Notice 2021-02, extending the relief through June 31, 2021. On June 24, 2021, the IRS issued Notice 2021-40 again extending the temporary relief through June 30, 2022 (collectively "Notices"). The conditions for obtaining relief from the physical presence requirement are the same under all three notices and are summarized below.

For plans that impose a physical presence and/or notary requirement not required by law on other elections, the state rules for notary publics would continue to apply and the simplest administrative process would be for the plan to follow the relief for these other elections as well.

2. Conditions for Relief to Apply

The Notices provide temporary relief from the physical presence requirement provided that the conditions below are met.

- *Participant Elections Witnessed by a Notary Public.* The Notices provide that the physical presence requirement may be satisfied for any participant election witnessed remotely by a notary public in a state that permits remote electronic notarization if the individual's signature is witnessed via live audio-video technology and is consistent with any state law requirements that apply to the credentialing of the notary public or notarization process. As of July 1, 2021, all states currently permit some form of remote electronic notarization either on a permanent or temporary basis except California, Georgia, Kansas, Louisiana, New York and South Carolina. (The rules in Illinois, Mississippi, New Mexico and Connecticut expire shortly unless renewed.) Since these rules are evolving, the Fund should confirm the current rule for the applicable state at the time of the application.

- *Participant Elections Witnessed by a Plan Representative.* For any participant election witnessed by a plan representative, the physical presence requirement may be satisfied through a live audio-video conference that satisfies the following:

  - The individual signing the participant election must present a valid photo ID to the plan representative during the live audio-video conference;

  - The live audio-video conference must allow for direct interaction between the individual and the plan representative;

  - The individual must transmit by fax or electronic means a legible copy of the signed document directly to the plan representative on the same date it is signed; and

  - After receiving the signed document, the plan representative must acknowledge that the signature was witnessed by the plan representative and then transmit the signed document, including the acknowledgment, back to the individual through a system that the individual has an effective ability to access (in accordance with electronic notice requirements) and with a statement that a paper copy will be provided upon request, at no charge.

Please contact us if you have any questions about this relief.

cc: Co-Counsel (if any)

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