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America needs pension relief in HEROES Act — NOT the GROW Act

May 15— With the House of Representatives poised to vote on the next COVID-19 relief package, known as the HEROES Act, the Pension Rights Center applauds the congressional leaders who have included within the massive bill the important provisions of the Emergency Pension Plan Relief Act (EPPRA) which will strengthen the nation's multiemployer pension system. **PRC, however, urges Congress to strip from the package the misguided Giving Retirement Options to Workers Act (GROW Act), which would undermine this all-important system.**

By including EPPRA in the HEROES Act, Congress will not only help save workers' and retirees' pensions, but also stabilize for decades to come the federal agency that insures our nation's private pension plans, the Pension Benefit Guaranty Corporation (PBGC).

"More than 1 million workers and retirees have been closely watching Congress and waiting for policymakers to finally pass legislation that ensures full payment of their promised pensions, which they earned through years of toil," said Karen Friedman, the PRC's executive vice president.

"First, their hopes were buoyed in 2019 when the House passed a bill designed to protect their benefits, known as the Butch Lewis Act. But that legislation failed to advance in the Senate. Now, both the retirees and the PRC are excited that Congress has included the well-crafted EPPRA within the latest COVID-19 bill. By doing so, Congress recognizes that those workers and retirees who helped build this country and who will benefit from the legislation should be permitted to receive the retirement income they earned through hard work and playing by the rules. We urge all members of the House and Senate to make these pension rescue provisions a reality for these workers and retirees and for their families."

PRC strongly supports EPPRA because it shores up underfunded plans by providing the PBGC with the funding to take on certain liabilities of ailing plans. This "partitioning" process will ensure that the plans survive for the long-term and are able to pay in full the earned benefits owed to workers and retirees. The bill also increases the guarantees paid by the PBGC when plans fail and would restore benefits to retirees who have already had their benefits cut because of the unfair provisions of the Multiemployer Pension Reform Act of 2014. EPPRA shares a structure similar to a proposal advanced by Senate Finance

Committee Chairman Charles Grassley (R-IA) and Senate Health, Education, Labor and Pension Committee Chairman Lamar Alexander (R-TN).

"We believe that it's appropriate for EPPRA to be part of the HEROES Act since those most at risk of losing benefits in these multiemployer plans are the very same workers who are risking their lives to protect us in this time of crisis. They are the truck drivers who are transporting food and supplies, the nurses and health care workers at the front lines, the grocery store workers who are keeping us fed, the laborers who are building our hospitals, and the musicians who, despite social distancing, keep on playing for us online to soothe our anxiety" Friedman said.

"These are America's unsung heroes who do – and did – the essential jobs that we all are depending on in this time of lockdown."

Unlike EPPRA, which will strengthen failing multiemployer plans and protect workers and retirees and the PBGC, **passage of the GROW Act would undermine the multiemployer plan system by weakening currently well-funded plans and creating new inferior plans that do not provide guaranteed benefits. It would also lead to the underfunding of the PBGC.**

PRC urges the leaders of the House of Representatives to drop the GROW Act from the HEROES Act.

The GROW Act is also vigorously opposed by AARP, the Western Conference of Teamsters, the SEIU, IBEW, Steelworkers, Machinists, Boilermakers and other unions and organizations.

The Center also cheers inclusion in the HEROES Act of a provision that would provide grants to community-based organizations to help low-income divorced women and survivors of domestic abuse receive their court-awarded retirement benefits. This provision was originally introduced by Senator Patty Murray (D-WA) and House Members Jan Schakowksy (D-IL) and Lauren Underwood (D-Il) as part of the Women's Retirement Protection Act (S.975, H.R. 2005).

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Summary of CARES Act provisions relating to retirement plans

Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act, Public Law 116-136) in response to the economic downturn caused by the coronavirus pandemic. The Act includes several items designed to ease employees' access to their retirement funds and certain provisions allowing employers to delay contributions to their pension plans. The Act was effective March 27, 2020.

The retirement provisions of the CARES Act are temporary. Those that most directly affect employees are early withdrawal and plan loan provisions that apply to 401(k), 403(b) and governmental 457(b) retirement savings plans. Most employers with these retirement savings plans will probably take advantage of the temporary changes to their plans that are permitted by the Act. However, employers are not required to adopt the changes. You may want to contact your employer or plan administrator to learn how the Act may impact your retirement plan.

<u>CARES Act temporary changes to retirement savings plan rules</u>

The following temporary adjustments to retirement savings plan rules only apply to persons directly affected by the COVID-19 virus, who have been laid off or otherwise lost employment income, who are sick or have family members who are sick due to the virus.

- *Tax relief for early withdrawals from retirement savings plans*, 401(k)s, 403(b)s, 457(b) governmental plans and IRAs, apply to workers with COVID-19 related loss of income or illness of the worker or close family members.

    - Ordinarily, if you take money out of your retirement savings plan to use for a "hardship" before age 59 ½ you would have to pay a ten percent penalty tax (as well as income tax) on the amount you withdraw. The penalty or "excise" tax for early withdrawals will not apply during 2020 for COVID-19 related distributions that are less than $100,000. The $100,000 limit applies to combined distributions from more than one plan and/or IRAs. Money withdrawn can be repaid over a three-year period. Partial repayments are permitted. Any amount repaid within three years will not be subject to income tax. If the money is not repaid it will be taxable, but the tax amount will be spread over a three-year period.

The tax relief for early withdrawals also applies to COVID-19 distributions taken before other permitted events, such as termination of employment or disability, provided that the distribution is one permitted by the plan.

- *Modifications to plan loan limits and due dates* apply to workers with COVID-19 related loss of income or illness of the worker or close family member.

    - The plan rules must permit workers to take loans from their retirement savings accounts. The maximum amount of a loan is increased to $100,000 or the entire vested account balance for loans taken within 180 days after March 27, 2020 (between March 27 and September 23, 2020). Loan payment due dates are extended for one year for payments that are due between March 27 and December 31, 2020. This applies to payments due for new or existing loans. However, interest will continue to accrue on the unpaid loan amount.

    - These modifications to the rules for plan loans do not apply to workers with IRAs.

CARES Act temporary changes to pension plan rules

- The funding rules for single employer defined benefit pension plans are relaxed. The due date for employer contributions to plans is extended until January 1, 2021.

CARES Act temporary changes for Required Minimum Distributions (RMDs)

- Required minimum distribtuions (RMDs) for 401(k), 403(b), 457(b) governmental plans and IRAs are waived for 2020. However, individuals who want a RMD may still request one.

  The waiver applies to all individuals who would be required to take a minimum distribution from a retirement savings plan in 2020. (RMDs do not apply to Roth accounts or IRAs.) Individuals age 72 and over are required to take minimum withdrawals from their traditional IRAs and their retirement savings plans each year. The waiver also applies to individuals who turned 70 and ½ in 2019 and had not paid a RMD before January 1, 2020.

  Individuals who have already received a RMD for the year 2020 may be able to roll the RMD amount into an IRA or another retirement plan if they can meet the IRS rules for rollovers. Generally, to avoid taxes a rollover must be accomplished within 60 days from the distribution date. The IRS has relaxed the rollover timeline for the COVID-19 emergency. IRS Notice 2020-23 extends the permissible 60-day rollover period until July 15, 2020 for disributions taken between February 1, 2020 and May 15, 2020.

Labor Department Notice related to the COVID-19 emergency

- The U.S. Department of Labor issued Disaster Relief Notice 2020-01 that allows both pension and retirement savings plans to delay providing certain notices and to provide them electronically in certain circumstances. The Notice also allows employers to delay forwarding contributions to 401(k) plans, and temporarily suspends the deadlines for employees and retirees to file claims for retirement benefits and appeals of denials of benefits.

  - The Notice extends the deadlines for employers to furnish notices that are due between March 1, 2020 and 60 days following the announced end of the COVID-19 National Emergency provided the plan fiduciary provides the notice as soon as administratively practicable. Additionally, employers and plan administrators may use alternative means to furnish notices, such as electronic communications, provided that the plan fiduciary has reasonably determined that the recipients of any electronic communications have the ability to effectively access notices delivered electronically. Plan fiduciaries must make a diligent effort to comply with disclosure requirements and to correct any deficiencies as soon as possible.

  - The Notice states that the Labor Department will not take an enforcement action for delay in forwarding employee contributions to a retirement savings plan when the delay is related to COVID-19. Employers and service providers must act reasonably and in the interests of employees to comply as soon as possible.

- Deadlines to file claims and appeal denials of claims during the period between March 1, 2020 and 60 days after the announced end of the National Emergency will be disregarded. Deadlines for claims processing will be relaxed, although plan fiduciaries should minimize any loss of benefits or undue delay in benefit payments.

- Advance notice will not be required for a "blackout period" (a period of more than three business days when the rights of participants in 401(k) plans to change investments, take out a loan or other distribution) may be restricted or limited, if the inability to provide advance notice is due to the COVID-19 pandemic.

For more information:

- **EBSA Disaster Relief Notice 2020-21**
- **IRS: Coronavirus-related relief for retirement plans and IRAs questions and answers**
- **Federal Register: Extenstion of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak**

This Is No Time to Deny Workers and Retirees Vital Information about their Retirement Plans

The Department of Labor, the agency charged with *protecting* people's rights to retirement benefits, wants to adopt a new rule that would *undermine* workers' and retirees' rights by making it far less likely they get the information they need to plan their retirement and watchdog their pension or 401(k) plan, with many never receiving the information at all. This is because DOL proposes to reverse the rule on how consumers receive retirement information: from paper disclosures sent by mail, to emails notifying consumers to come to a website and find the disclosure.

Advocates for workers and retirees call on Congress to act to shelve this rule to ensure that people actually receive the disclosures that could make or break their future economic security.

This proposal would be reckless at any time, but is particularly ill-timed as the United States, and countries across the globe, face the biggest economic and public health crisis in nearly a century. With the stock market nosediving almost daily, people are watching helplessly as their 401(k) account balances plummet, and their pension funds endure losses that could jeopardize their benefits.

What people need, especially now, is critical information about their retirement funds and rights, delivered to them in a way that will be reliably received and preserved. But, DOL's proposed rule does the opposite. It will all but deny them that information by enabling financial services companies to bury the information on a website and place the onus of finding it on consumers.

In reality, this would mean that workers may never see how much their 401(k) balances are falling or whether their employer stopped contributing to their account. They may never get notices telling them that their pension plans are in financial trouble due to the stock market or a business failure. They may not learn that their multiemployer plan just filed for authority to cut their retirees' benefits by 50 percent. They may never know whether a mistake was made in calculating their benefits or even know what the terms of the plan are.

Current Regulations Protect Consumers, the DOL Rule Endangers Them

When Congress passed the federal private pension law, ERISA, it understood that receiving key information about one's retirement plan is necessary for people's ability to understand their benefits and enforce their rights. Participants and their beneficiaries (such as surviving spouses) are legally entitled to receive important information such as the rules governing the retirement plan and the benefits they have earned, the rights of surviving spouses, and much more.

Importantly, longstanding regulations provide that, unless a worker uses a computer as an integral part of their job duties – is "wired at work" as the Labor Department calls it – or has affirmatively told the plan administrator that they would like to go "paperless," workers and retirees must receive information about their retirement plans *on paper, sent through the mail*. That's a sensible default rule that protects consumers and ensures they actually receive these documents, can read them, and can save them for future reference.

However, this proposal:

- Admits but is indifferent to the digital divide - Access to the internet has greatly expanded over the last 20 years but this growth has not been uniform; access to the internet and broadband is substantially lower for many groups. DOL admits its rule would create additional impediments for many who lack access but does nothing to fix it.

- *Rural residents* – Nearly 40% of rural residents lack access to basic fixed broadband service, and more than 30% of rural residents do not own the type of device – computer or laptop – suitable for viewing and storing complex financial documents.
- *Low earners* - Many don't have broadband because of the steep monthly cost. Nearly one-fifth of those who earn $30,000/yr. or less do not use the internet, and nearly half of low-earners don't have a traditional computer or laptop. About one-fourth of black and Latino adults depend on a smartphone for their only internet access.
- *Older adults* - More than one-fourth of all adults age 65+ do not use the internet, which means that a huge number of retired participants and beneficiaries will be disadvantaged.

- Obliterates records needed to vindicate rights – People don't realize they need retirement documents until they need them – often decades after participating in the plan or after a participant dies. The DOL rule also permits erasure of documents from the website as soon as they're superseded, when it could have easily required plans to *indefinitely retain* all versions of all records in an easily accessible & searchable online archive. This will exacerbate the already-increasing problem of lost pensions, and disproportionately harm women who are more reliant on receiving retirement benefits as *beneficiaries* – as surviving spouses and as former spouses.
- Creates windfall profits - $2.4 billion in estimated savings over 10 years would go into pockets of the financial services industry rather than being returned to the workers and retirees (e.g., as lower fees) for whose *sole* benefit these plans are legally required to operate; the proposed rule does nothing to redirect the savings to consumers.

Studies consistently find that consumers of all ages prefer to receive financial documents on paper in the mail and think this should be the default rule, with an option to choose paperless. However, at the urging of the financial services industry, DOL is proposing to change the default to email notices that would tell consumers to come to a website to find the disclosure. DOL calls it "notice and access;" in reality it is "hide and seek." Workers and retirees would be given a one-time paper notice telling them they could opt out of hide-and-seek and request paper, but the process for doing so is vague and deficient, consumers would bear all of the burden, and industry knows most people would not do so because of inertia.

The field of behavioral economics teaches that defaults should be structured so as to take advantage of inertia – doing nothing should nudge people in the right direction, like automatic enrollment in a 401(k). But DOL's new default would *reduce* retirement security because inertia would result in receiving no disclosures. This is exactly what happened when the Social Security Administration quit sending out paper benefits statements in favor of online access (number getting statements plummeted by 80%), and when the Securities & Exchange Commission instituted a notice-and-access-type system for corporate proxy voting (voting by retail accounts fell by 73%). This rule would have the same effect: people would not receive or retain vital papers about their retirement plans.

Getting information is a bipartisan issue. Twenty-two Republicans and 16 Democrats in Congress filed a bipartisan comment letter opposing the DOL proposal, because "[t]he United States has a retirement savings crisis and nothing in this proposal helps lessen it. In fact, it will likely exacerbate the crisis by making it more difficult for some individuals to prepare for the future. Nothing is stopping retirement plan participants and beneficiaries from opting into e-delivery currently." Congress should take action to stop this harmful rule.

April 14, 2020

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Dear Ms. Weiser and Ms. Judson:

We write in response to letters recently sent to you by the SPARK Institute, U.S. Chamber of Commerce, and American Benefits Council asking for the issuance of guidance on handling certain disclosure and filing procedures during the COVID-19 crisis. All three letters asked for relief from compliance with certain spousal consent requirements. They also suggested that you consult with participant groups about protections for spouses as you address this issue.

The Pension Rights Center works to protect and promote the retirement security of workers, retirees, and their families. The National Women's Law Center is committed to improving the lives of women and their families across the nation. Although spousal benefits are important to all surviving spouses, because women are more likely than men to rely on their spouse's pension benefit in retirement, lifetime survivor pensions are particularly critical to women's retirement security.

For married participants, ERISA and the Internal Revenue Code require that tax qualified defined benefit pension plans, money purchase plans, and target benefit plans automatically pay out their benefits in the form of a qualified joint and survivor annuity (QJSA), which entitles the spouse to a survivor pension equal to (at least) 50% of the benefit payable to the participant.[1] In order for the participant to take a different form of payment (e.g., a single life annuity, lump sum, or other form of distribution authorized by the plan), or to designate a non-spouse beneficiary, the spouse must give her/his written consent to the participant's election. If she/he does not consent, there is no waiver of rights and the pension must be paid in the form of a QJSA.

The statute and regulations also specify that certain procedural safeguards must be met to execute a valid spousal consent. These requirements are not extensive, but they are the linchpin for the effective enforcement of this important right, and to help prevent fraud or coercion. Key requirements include:

- *Informed Consent* – Spouses are entitled to receive written disclosures explaining the various payout options, their value, the consequences of their decision, and their rights to withhold

[1] Defined contribution plans are not legally required to obtain spousal consent for the participant to take a loan or hardship withdrawal, to make a distribution to the participant, or to roll the funds over into an individually owned IRA. Spousal consent is only legally required for private-sector DC plans in order to designate a non-spouse beneficiary to receive the balance if the participant dies with funds in the plan, or if they offer annuity options and the participant wants a single life annuity. However, some defined contribution plans voluntarily impose spousal consent requirements on loans or distributions from 401(k) plans, in which case these plans could also be covered by whatever the Treasury and IRS decide to do for DB, money purchase, and target benefit plans during this temporary shutdown period.

consent. This information is vital to their ability to make informed decisions and to know their rights.

- *Provided in Writing* – The consent must be provided by the spouse's signature. This requirement is necessary to help prevent fraud. A signature is capable of being independently authenticated and having it in writing (on paper or on an electronic pad) produces a record that can be used as evidence if there is a later dispute.
- *Witnessed in Person* – The consent must be signed by the spouse in the *physical presence* of either a notary or the plan administrator. By enabling the notary/administrator to check the identification of the signer, to see the signature being affixed, and to observe the signer's demeanor while signing, the physical presence requirement helps to prevent fraud by imposter/forgery, and makes it less likely that the signature is the result of coercion.

Plainly, compliance with the physical presence element of this regime is not possible during a period in which businesses are temporarily shut down and individuals are being asked not to go out or be near others. Industry is recommending a temporary measure to address this problem, and we agree that some sort of temporary accommodation is needed so that participants can retire and access funds they may need to respond to the current emergency.

However, given the increased potential for fraud posed by sidestepping the physical presence requirement, as acknowledged by SPARK, and the increased risk of coercion, as evidenced by the worldwide spike in reports of domestic violence aggravated by the lockdown and financial stress, any temporary alternative to the physical presence requirement must be carefully structured and accompanied by adequate safeguards. Without appropriate protections at the front end, the benefits could be cashed out and placed beyond the reach of surviving spouses, who could face an irreversible, lifelong loss of retirement income. Thus, we make the following recommendations to reduce the risks for spouses.

<u>Recommendations</u>

1. *Modify, rather than excuse, the usual spousal disclosure and consent requirements*. A temporary inability to comply with the physical presence requirement does not excuse compliance with all the other requirements.

2. *Any modification to the physical presence requirement should be temporary* – It should automatically sunset when state or national shelter-in-place requirements end and businesses reopen, or in 6 months, whichever is sooner. If the shelter-in-place period needs to extend beyond 6 months, there is the option to extend the time period.

3. *Lump sum distributions from defined benefit plans should be limited in size* – Lump sum distributions permitted without physical presence should limited to a maximum of 10% of the value of the participant's pension benefit during this emergency period.[2] Ten percent of the lump sum value of a DB benefit is likely to be an amount that is sufficient to address most emergency needs. If the couple wishes to take more or all of the benefit in the form of a lump sum (or a form other than the default 50% QJSA), that action should await the

[2] Since few, if any, plans currently offer a partial (10%) lump sum distribution option, a plan amendment would be needed to permit a temporary emergency distribution option This amendment could be made after-the-fact and on a model form prescribed by the IRS..

reopening of businesses and should require compliance with all spousal consent requirements, including the physical presence requirement. A temporary inability to comply with the physical presence requirement should not be a license to bypass protections that have lifelong consequences.

4. *Recorded video chats or telephone conversations can be permissible temporary alternatives* - During this period, the signing of the spousal consent form, witnessed using video technology (e.g., FaceTime, Skype, Zoom, etc.) between the spouse and the plan administrator, should be permitted if the additional requirements in Recommendation #6 below are also satisfied. The plan administrator should handle witnessing duties in the same manner that the administrator would normally do, plus authenticate identity visually and also ask to see a government-issued ID,[3] determine coercion/duress (e.g., ask if anyone else is in the room, ask whether the spouse is making the decision freely, observe the spouse's demeanor), and watch the spouse sign the document. The video chat should be recorded by the plan administrator.

   If (and only if) the spouse does not have access to video conferencing technology, these functions should be handled in a telephone conversation between the spouse and plan administrator, and the phone call should be recorded by the plan administrator. In addition, for telephone "witnessing," the plan administrator should execute some form of two-factor authentication. If the spouse can text or email a closeup photo of the government-issued ID plus a photo of herself/himself holding that ID, that could be one of the factors. While not fraud-proof, a call to the spouse using the spouse's home or cell phone number on record with the plan could be a second factor.[4] In both cases, the plan administrator should retain the recording along with all other plan records related to the payment of benefits. At the outset of the video chat or telephone call, the spouse should be notified that the video chat or telephone conversation will be recorded and retained.

5. *Remote notarization should not be permissible for this emergency purpose* - Plan administrators are familiar with the plan rules and procedures, and they keep plan records, such as the participant's election and the spouse's signed consent form. They can easily preserve the video/telephone conference call as part of those records. Moreover, by having the plan administrator be responsible for witnessing the consent, it is easier to administer the below requirements for paper disclosures before the video/telephone call and a paper backup procedure afterward. Furthermore, as pandemic conditions increase the haste and stress under which participants and beneficiaries are making financial decisions, as well as the risk of fraud and coercion, it is important that the witnessing party have familiarity with the substance of the documents being signed to be able to answer questions, clarify content, and assess whether the beneficiary fully understands the consequences of her/his signing.

6. *Paper disclosures and backups required* – Before the execution of the spousal consent, the couple should receive the usual required informational disclosures on paper, sent by a method no slower than first class mail, unless the spouse has affirmatively elected to receive them as

[3] This should require the spouse to hold the ID close up to the camera so that its details are readable and to help detect obvious ID tampering.
[4] Simply asking the spouse for her/his Social Security number, home address, or other such basic information is not sufficient since it is likely to be known by the participant-spouse and could easily be provided to an imposter.

electronic attachments to email (*not* simply posted on a website). Following the video chat (or telephone call), the plan administrator should be required to send two paper copies of a special COVID-19 emergency consent form to the spouse by a method requiring signature confirmation (as prescribed by the U.S. Postal Service for the COVID-19 crisis), with a self-addressed stamped envelope (people cannot easily get to the post office and may not have a copier at home).

The special COVID-19 emergency consent form should explain the temporary spousal consent procedures and how they differ from standard procedures and also inform the spouse about the 10% limitation on lump sum distributions. The IRS could ease the burden on plan administrators by providing a model form. The spouse would keep one copy (interim copy) and sign one (in front of the plan administrator using video technology, if available) to send back to the plan. The plan should mail a paper copy of the signed final form back to the spouse for her/his records. In the event that the spouse raises any questions about the validity of the consent provided by video or telephone, the consent should be revocable within 30 days of receiving the signed final copy of the consent form.

Spousal pension rights can and must be protected during this unprecedented time of economic shutdown and physical distancing. Any alternative to the physical presence requirement should be temporary, limited, and accompanied by adequate procedural safeguards.

Finally, both SPARK and ABC have requested temporary authority to send joint and survivor and all other notices and disclosures electronically, "even if such delivery methods would not satisfy the Department's *existing or proposed* electronic delivery safe harbors…."[5] We strongly oppose this request. Most plan administrators are capable of complying with current requirements, especially if their requests to delay deadlines for making those disclosures are granted. For the few instances where it is not possible for a plan to send out paper disclosures, the plan could ask participants and beneficiaries if they would be willing to affirmatively opt in to electronic delivery for a very limited period of time (e.g., 3 months), with a commitment to resume paper notices after that limited time ends.

We urge you to do all you can to safeguard the rights of workers, retirees, their spouses during this difficult time. Please do not hesitate to contact us if you have any questions or need further information.

Sincerely,

Karen W. Ferguson
Director
Pension Rights Center

Amy K Matsui

Amy K. Matsui
Director of Income Security & Senior Counsel
National Women's Law Center

[5] Letter from Lynn Dudley, Senior Vice President, American Benefits Council, to various DOL and I-Treasury officials 7 (Mar. 26, 2020) (emphasis added), *available at* https://www.americanbenefitscouncil.org/pub/?id=1C8FAF08-1866-DAAC-99FB-0ED037160EE5.

Via Electronic Delivery

May 1, 2020

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Dear Ms. Weiser and Ms. Judson:

We feel compelled to write to you once again[1] on the issue of guidance on handling the spousal consent process for retirement plans during this time of social distancing. This letter responds to the letter of April 20, 2020 sent to you by the American Benefits Council,[2] which misrepresents our recommendation for how to accommodate the physical presence requirement, and inappropriately relies upon the recent Interim Rule issued by the Federal Retirement Thrift Investment Board to justify its position.

The job losses triggered by the COVID-19 virus are unprecedented. The Pension Rights Center agrees with ABC that:

> "In some cases, the only source of funds that families have to pay for the basics of life is their retirement *savings*. Although we believe that retirement *savings* are for retirement, families who cannot pay daily bills have an overriding problem that must be addressed."[3]

However, ABC then makes an unwarranted leap, from the fact that some participants may need to access their savings, to argue that participants should be able to cash out a career's worth of lifetime monthly pension benefits to meet those needs, without the safeguards that are needed for spouses in order address the risk of fraud – a risk that their fellow commenters earlier admitted would be heightened by omitting the existing physical presence requirement[4] – and the risk of spousal coercion.[5]

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[1] Letter from Karen Ferguson, Pension Rights Center, & Amy Matsui, National Women's Law Center, to Carol Weiser, Treasury, & Victoria Judson, IRS (Apr. 14, 2020), *available at* http://www.pensionrights.org/sites/default/files/docs/prc-nwlc_letter_on_emergency_spousal_consent_4-14-20_f.pdf.

[2] Letter from Jan Jacobsen, American Benefits Council, to Carol Weiser, U.S. Dept. of the Treasury, Victoria Judson, IRS, & Catherine Jones, IRS (Apr. 20, 2020), *available at* https://www.americanbenefitscouncil.org/pub/?id=20BE3929-1866-DAAC-99FB-2073D07877B4.

[3] *Id.*, at 1 (emphasis added).

[4] Letter from Tim Rouse, Executive Director, The SPARK Institute, Inc., to Carol Weiser, U.S. Dept. of the Treasury, Victoria Judson, IRS, and Preston Rutledge, U.S. Dept. of Labor, re: Request for Relief and Guidance Because of COVID-19 (Mar, 23, 2020) at 7, *available at* https://www.sparkinstitute.org/wp-content/uploads/2020/03/SPARK-Institute-letter-requesting-coronavirus-relief-3-22-20-final.pdf.

[5] *See generally*, A. Fernandes-Alcantara & L. Sacco, Cong. Research Serv., IN11323, *Domestic Violence in the Context of COVID-19*, at 1-2 (Apr. 10, 2020), *available at* https://www.everycrsreport.com/reports/IN11323.html; K. Wells & T.

It is certainly true that private sector defined contribution plan participants can tap their retirement savings and make withdrawals (both in-service and after separation) from 401(k) plans without spousal consent, a gap in protections that we have long sought to fix.[6] Defined benefit plans, though, are qualitatively different. They are not "savings." Rather, they provide monthly income in retirement that cannot be outlived or lost in the stock market, and they do so in a manner that provides economic security both for retirees and their surviving spouses. The decision to liquidate an entire DB pension as a lump sum is one that would impact the retirement income security of both participants and their beneficiaries and should not be made during a moment of financial distress. It is critically important that this decision not be made without adequate protections for spouses, a protection the physical presence requirement in Treas. Reg. § 1.401(a)-21(d)(6) was intended to provide.

ABC's letter alludes to the previous recommendation by the Pension Rights Center and the National Women's Law Center that lump sum distributions from a DB plan that are made without meeting physical presence requirement be limited to 10% of the lifetime value of the benefit. The letter seriously misrepresents our position on modifying that mandate. We were not suggesting that a family that "may desperately need their retirement benefits" should "jeopardize their health in order to obtain all the money that is owed to them" by venturing out to see a notary or plan representative in person.

Rather, we think that the temporary nature of the lockdown that is preventing physical presence, the fact that such a decision is being made during a time of financial stress, the heightened risks of fraud and coercion when the physical presence requirement is not met, and the lifelong, irreversible consequences of cashing out a pension annuity for both spouses, together argue for a substantial *but temporary limitation* on lump sum distributions from DB plans.[7] Businesses, including notaries, will gradually reopen within a few months, and if a couple wishes to take more or even all of their DB benefit in the form of a lump sum at that time, they will be able to comply with the physical presence requirement and do so.

ABC attempts to support its position that there should be no limit on lump sum cash-outs of DB pension annuities by pointing to an interim rule recently issued by the Federal Retirement Thrift Investment Board that allows spousal consents to Thrift Savings Plan withdrawals to be made without being notarized.[8] The reliance is misplaced. The federal TSP and private sector DB plans are fundamentally different in ways that are materially relevant here.

Klosowski, "Domestic Abusers Can Control Your Devices. Here's How to Fight Back," *N.Y. Times* (*Wirecutter*), Apr. 6, 2020, *available at* https://www.nytimes.com/2020/04/06/smarter-living/wirecutter/domestic-abusers-can-control-your-devices-heres-how-to-fight-back.html.

[6] PRC and NWLC both support legislation to require spousal consent for withdrawals from 401(k) plans. *See e.g.*, Women's Retirement Protection Act, S. 975, 116th Cong., § 3 (2019).

[7] Our purpose in recommending a 10% withdrawal limitation is to preserve a survivor pension – and the retirement security it provides – for spouses. An alternative would be to give plans the option of allowing the participant to cash out an amount equal to the present value of the *participant's portion* of the joint and survivor benefit without meeting the physical presence requirement, if the plan also commits to provide a lifetime survivor annuity benefit to the spouse after the death of the participant that is equal to what she/he would have received had the couple received the 50% QJSA form of payment.

[8] Temporary Waiver of Notarization Requirement for Spousal Consent, 85 Fed. Reg. 21311 (Apr. 17, 2020), *available at* https://www.federalregister.gov/documents/2020/04/17/2020-07734/temporary-waiver-of-notarization-requirement-for-spousal-consent.

TSP accounts are retirement *savings* accounts. They are DC benefits that *supplement* the substantial, underlying DB annuity benefits provided by FERS and CSRS. Unlike private sector retirement savings plans, such as 401(k)s, the TSP is structured to make distributions in the form of a joint life annuity with a 50% survivor benefit, unless the spouse provides signed, notarized consent to give it up and agrees to some other form of distribution. Thus, even if a TSP is cashed out as a lump sum, the lifetime retirement security provided by a FERS/CSRS annuity, including its surviving spouse annuity, *is still there*. That would not be the case under the position asserted by ABC.

Moreover, the Federal Retirement Thrift Investment Board did not suggest that it believes that notarization is unnecessary or should be dispensed with while people are sheltering in place. Rather, it stated that a major reason why it was promulgating the interim rule was because "TSP does not currently have the technological workflow to allow participants to submit remotely notarized forms electronically."[9] We have concerns with the TSP interim rule and plan to send a letter by the comment deadline and will copy you on that letter. In any event, the TSP rule offers no support for the position ABC argues for here.

Our prior recommendations stand. We urge IRS-Treasury to issue guidance permitting some temporary modification of the physical presence requirement for spousal consents during this interim period when businesses are not open and it is impossible or imprudent to visit a notary in person. In doing so, though, we urge you to impose a tight, numerical limitation on the amount of a DB benefit that can be accessed without meeting the physical presence requirement (or alternatively, to guarantee the spouse's survivor pension) and that, in addition, any such distribution be accompanied by procedural safeguards of the sort advocated in our prior, April 14 letter.

Sincerely,

Karen W. Ferguson	Amy K. Matsui
Director	Director of Income Security & Senior Counsel
Pension Rights Center	National Women's Law Center

[9] *Id.*

By email to S Tackney w cc to V Judson and Carol Weiser 5/3/20

Loosening Spousal Consent Requirements

During this period in which stay-home orders apply to employees due to the corona virus pandemic, you may be asked to issue special rules relating to retirement plans, including rules for plans that are subject to Code section 401(a)(11)(A) relating to the requirement of spousal consent to payments to plan participants that are not in the form of the plan's statutory joint and survivor annuity. I am generally sympathetic to changes in these rules given the current obstacles to notarization of spousal consent or consent in the presence of the plan administrator. However, any change in these rules should be carefully limited.

Here are my suggestions:

(1) Any change in the rules should automatically cease to apply at a future date on which banks are open in jurisdictions containing employees who are plan participants, so that notarizations are widely available to them.

(2)(a) A special rule should apply allowing a distribution from a defined benefit plan to a married participant without spousal consent, including a lump sum payment, subject to the following condition: the plan provides that if the participant predeceases the spouse and was still married at the date of the participant's death, the spouse is entitled to a life annuity in the same amount as would have been payable if the plan's statutory joint and survivor annuity had instead been elected (with such death benefit to be subject to any QDRO that may be issued thereafter with respect to the participant's benefit under the plan).

- For example, if the participant were entitled to forms of payment commencing immediately that include a level life annuity (of say $1,000/month), a 50% statutory joint and survivor with the spouse (of say $850/month, with $425/month payable to the spouse), an alternative 75% joint and survivor annuity with the spouse, or an alternative lump sum payment (of say $100,000), then the participant could elect to receive a lump sum payment of $85,000 without any spousal consent, with the spouse to receive a life annuity of $425/month upon the participant's death assuming they were still married on the date of death.

After the end of the period described in (1) above, these conditions would cease to apply and the then present value of the contingent death benefit could be paid to the participant with spousal consent in accordance with the normal spousal consent rules.

(b) In the case of a defined contribution plan that is subject to Code section 401(a)(11)(A), a similar condition would apply under which a portion of the account balance would be retained by the plan similar to the rule in (1)(a) above (based on reasonable annuity estimates).

- For example, if the participant were entitled to have his or her $100,000 account balance applied to purchase an immediately commencing annuity of say $1,000/month, a 50% statutory joint and survivor with the spouse of say $850/month, with

> $425/month payable to the spouse, an alternative 75% joint and survivor annuity with the spouse, or an alternative lump sum payment of say $100,000, then the participant could elect to receive a lump sum payment of $85,000 without any spousal consent, but with the remaining $15,000 balance retained until the earlier of (i) the participant's death or (ii) the end of the period described in (1) above.

This rule would of course also be subject to any QDRO issued thereafter with respect to the participant's benefit under the plan.

(c) The spouse needs to be notified of the death benefit under either (a) or (b) above. I am not sure of how this condition can be assured, but there is no reason for a participant to have a self-interest in evading it (I disregard spite). Hopefully, at some later date, there will be an effective solution to the problem of finding lost participants and beneficiaries.

(d) In the case of a defined contribution plan that is not subject to Code section 401(a)(11)(A), spousal consent is required in order for a married participant to designate a beneficiary other than the participant's spouse, I see no reason to provide a special exception, even in the current crisis. But if one is provided, it should meet the standards described in (4) below.

(3) While the suggestions in (1) and 2(a) and (b) above raise other qualification issues, including under Code section 401(a)(9), I believe you can find answers to these that are consistent with the general standards that apply during the current crisis.

(4) I believe that the suggestions in (1) and 2(a) and (b) above are simple, workable and should be attractive to plans, so that no further alternatives need to be made available. However, if you conclude otherwise, then any exceptions to the spousal consent rules should be as limited as possible. I am concerned that whatever alternatives you provide will be abused if that is at all possible. This belief is based on the rather obvious point that sadly marriages can and often do change (the Corona virus has not helped in this regard). Further, employees naturally tend to think of plan benefits (especially 401(k)) as their own and often have their spouse's passwords. During the comment period before issuance of Treasury Regulations section 1.401(a)-21, comments indicated that actual fraud is attempted (often successfully) regarding spousal consent.

An example of the types of conditions that you may wish to consider to prevent fraud are the following. (i) The spousal consent is made before the plan administrator via a remote video conference that is recorded by the plan in which the spouse shows identification (such as both sides of a driver's license or a passport). The recording would be a material factor to prevent fraud since it would be retained by the plan so that it could be used in a criminal proceeding to identify the person who falsely purported to be the spouse. (ii) Further, there also needs to be some second electronic method to confirm the consent and identity, such as an old-fashioned phone call from the plan administrator to the spouse on a different date. Two-factor authentication is now standard practice to prevent electronic fraud.

To repeat, if a plan chooses not to use the alternatives in (1) or (2) above (under which the spouse is assured of receiving the statutory death benefit), the alternative should be as strict as possible to prevent fraud. There may be other methods to prevent fraud than I have described, but whatever method is allowed should be at least as secure as the conditions I suggest in this (4) – indeed more secure if you can think of better methods to prevent fraud than I can.

The recommendations above solely reflect my own personal views. Please feel free to contact me if you have any questions. Bill Bortz

Recoupment Proposal

Examples of Overpayments

- Defined benefit pension plan has incorrect date of birth, miscalculates compensation, incorrectly determines years of credited service, etc.
- Participant is receiving a life annuity from a defined benefit pension plan and dies, but family does not promptly notify the plan
- Defined contribution plan miscalculates plan investment rate of return; or an employer profit sharing plan contribution at year end is to be allocated to employees per their compensation for the year and 1 employee incorrectly is included or his compensation is incorrectly overestimated (which results in an under contribution for everyone else)
- Plan pays the wrong beneficiary after the participant dies

EPCRS Principles (IRS Rev Proc 2019-19)

- EPCRS arose out of a large disqualification case (around 1990) where a pension plan had paid out lump sums to all ps without getting spousal consent. The plan offered to pay the spousal annuities, but IRS wanted to disqualify the plan anyway. The IRS took into account practitioner complaints that disqualification was too harsh if the plan was willing to correct by providing spousal annuities for any participant who had taken a lump sum without spousal consent.
- An overpayment is an operational error and EPCRS requires the plan to put every participant and beneficiary in the same position they would have been in if no operational error had occurred (otherwise plan is disqualified)
- Plan can self-correct; the employer can submit a proposed correction to the IRS for its approval; or correction can arise during an audit
- A plan must correct the operational error with various time limits that depend on how significant the error is (same year; within 3 years; or later)

Correction: If the qualification error is an overpayment, then plan must get the excess back.

- DB example: a monthly annuity of $1,500/month was being paid but should have been $1,200/mo, but 3 years later the plan discovers the error. The plan adds up all 3 years of overpayments, adds interest, and converts that to an actuarially equivalent life annuity (suppose the equivalent annuity is $175/mo), in which case the annuity is reduced from $1,500/mo to $1,025/mo (the $1,200 correct amount minus $175).
- DC example: plan pays account balance of $100,000 in 2017 which participant rolls into an IRA, but account balance was only $90,000. Participant must withdraw $10,000 plus earnings from the IRA (say that is another $800) and pay $10,800 back to the plan. The

participant also owes tax (including the 10% penalty tax) on the initial $10,000 payment and on the $10,800 withdrawal from the IRA.

Legislative Proposal

- No recoupment is allowed for an annuity if the first overpayment was made more than 3 years before notice is given to the participant or beneficiary
- No interest can be charged
- Subject to the 3-year notice rule, the plan can pay the correct annuity amount reduced by the equivalent of the overpayments made, but (i) the plan cannot pay less than 90% of the correct annuity amount, (ii) the reduction in any year cannot exceed 10% of the cumulative excess amount, and (iii) the reduction below the correct amount has to stop when the overpayment amount has been fully recovered by the plan
- No recoupment is allowed against a beneficiary for an overpayment made to the participant
- Recoupment is never required unless the failure to recoup would adversely affect other participants (which would be an extremely rare situation).
- To the extent an excess lump sum amount was rolled over to an IRA and is not being recouped by the plan, the rollover is treated as a tax-free rollover, and any excess being returned to the plan can be rolled back from the IRA into the plan tax free

The changes above are limited to inadvertent overpayments and do not apply to payments in excess of the legally permissible benefit.

Any participant or beneficiary has a right to dispute the plan's claim of overpayment under the plan's claims procedure (and plan cannot simply turn collection over to a collection agency). The plan can always seek recovery from the fiduciary, employer, or other party responsible for the overpayment.