PENSION RIGHTS CENTER

PROTECTING AND PROMOTING RETIREMENT SECURITY
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Submitted via http://www.regulations.gov

Pension Benefit Guaranty Corporation
Rulemaking:
Special Financial Assistance by PBGC
Regulation Identifier Number: RIN 1212-AB53

August 10, 2021

To Whom It May Concern:

The Pension Rights Center ("the Center") submits the following comments on the PBGC's Interim Multiemployer Financial Assistance Regulation (hereinafter "IR"), published in the Federal Register on July 12, 2021. The Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers, retirees, and their families.

We note our strong interest in the subject area of the agency's guidance. Since the early 2000s when some multiemployer plans began to experience signs of financial vulnerability, an important part of the Center's agenda has been to ensure the survival of the multiemployer pension system, which has served several generations of workers and retirees. The Center thus celebrated the passage of the Special Financial Assistance Program for Financially Troubled Multiemployer Plans (hereinafter referred to as the Butch Lewis Act[1]), as part of the American Rescue Plan Act of 2021, which promises to secure the benefit expectations of retirees and those approaching retirement, improve the

[1] Estil "Butch" Lewis was an Ohioan, a Vietnam Veteran, and one-time president of the Teamsters Local 100 Union in Cincinnati. Mr. Lewis became a pension activist after the passage of the Multiemployer Pension Reform Act of 2014 (hereinafter "MPRA") threatened massive pension cuts to participants in multiemployer pension plans. He organized and advocated on behalf of his fellow retirees and union workers and their families, working with public officials in developing a means of saving financially troubled multiemployer plans without devastating reductions in the benefits they had been promised and earned. Mr. Lewis passed away of a stroke in 2015, attributed in part to the strenuous nature of his organization and advocacy work. It was the Center's honor to work with him and his spouse Rita. The House version of the American Rescue Plan Act referred to the provisions of the multiemployer financial assistance program as the Butch Lewis Pension Plan Emergency Relief Act of 2021 ("Butch Lewis Act"), as we do in these comments.

financial health of the PBGC's multiemployer program, and insulate local economies and the national economy against the potential impacts of plan collapses.[2]

At the outset, we wish to emphasize that our criticism of parts of the IR is not a criticism of the good faith or competence of the agency staff who were required to develop and publish a detailed set of regulations implementing a highly ambiguous statutory scheme in an unrealistically short period. We also appreciate that PBGC had valid reasons to start from a cautious interpretation of the statute, given the artificially truncated period of time to vet applications, and the fact federal assistance must be paid in a lump sum payment that cannot be retrieved or corrected even if it develops that the federal assistance was improvidently granted.

Unfortunately, the IR does not implement the Butch Lewis Act in a way that reflects the intent or letter of the law Congress enacted earlier this year. The several components of the guidance are not properly coordinated with each other nor with pre-existing statutory requirements, and these disconnects will undermine the long-term financial stability of the relevant plans and ultimately may increase the long term loss to PBGC. Most important, if the IR is not modified to address the failure to fully fund benefit accruals earned by active workers after an application is approved, plans can be expected to fail no later than 2051, the year the guidance has engineered as the failure date for plans receiving aid. And even if we assume the IR framework is consistent with the statutory language, it is literally impossible for either plan actuaries or the PBGC (and its contractors) to calculate several of the required data sets relating to future contributions with any degree of reliability, creating an assistance calculation process that is essentially arbitrary. This cannot be what Congress intended and there are interpretations of the relevant portions of Butch Lewis that are at least as literally plausible as the IR and that do not invite the irrationality and likely perils of the IR.[3]

Our comments are organized into four substantive sections: (i) prohibition on retroactive benefit increases; (ii) calculation of award amounts; (iii) investment allocation and related issues; and (iv) restrictions on withdrawal liability. We note that our ordering of the issues

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[2] The Center opposed those parts of the Pension Protection Act of 2006, which allowed plans to impose substantial targeted benefit reductions on individuals who had done nothing wrong except rely on their benefit promises. It was among the early supporters of partition remedy legislation for multiemployer plans burdened by "orphaned" participants and in 2014 the Center actively opposed MPRA, warning that it would lead to disproportionately savage benefit reductions for retirees and those just approaching retirement, in other words, those for whom it was too late to make up the losses. And since the passage of MPRA, we have worked with grassroots groups of retirees, with organized labor, and with industry, toward passage of legislation that would restore the financial health of troubled multiemployer plans without devastating benefit cuts.

[3] We do not agree that PBGC's *après 2051, le déluge* construction of the ARA is the most plausible reading of the statute, but our comments will assume that the IR and the Final Regulation will nevertheless survive the inevitable judicial challenge.

does not necessarily comport with our sense of their relative significance (although we regard all of the issues as important.[4]

1. Post-Application Benefit Improvements.

The IR prohibits any plan that has received Federal Financial Assistance ("FA") from increasing benefits on a retroactive basis, regardless of future circumstances. In contrast, the IR does permit increases in future accruals under some circumstances, primarily that they be paid for by new contribution sources not contemplated by the application for relief. The prohibition on retroactive benefit increases and limitation on prospective benefit increases are in addition to the ordinary restrictions on benefit increases for plans in critical status.

Particular decisions on the nature of plan benefit increases when a plan has a new source of contributions adequate to fund the increase and can document that in a manner acceptable to the Corporation should be left to plan trustees and the collective bargaining process. At the least, the IR should recognize a procedure under which a plan may apply for an exception to the prohibition against retroactive benefit increases.

Our concern in this regard is, in part, that some multiemployer plans have been amended under the Pension Protection Act of 2006 to eliminate or reduce certain previously subsidized benefits under the plan. Over the years, we and the pension counseling projects for whom we provide technical assistance have learned of many people who retired at a benefit that was in some only cases less than half of what they expected. To absolutely prohibit a plan from restoring some or all of those benefit cutbacks no matter what the future brings is neither necessary nor appropriate. Moreover, if the plan demonstrably has the resources (especially because of new contribution schemes but really for any reason), the distinction between retroactive and prospective increase is irrational without further qualifications.

The IR should be amended at least to provide for some flexibility for retroactive benefit increases if future circumstances permit it without endangering the plan's ability to pay all benefits.

2. The Amount of Financial Assistance

The Butch Lewis Act provides that if a plan qualifies for financial assistance, the assistance "shall be such amount required for the plan to pay all benefits due during the period beginning on the date of payment of the special financial assistance payment under this section and ending on the last day of the plan year ending in 2051 . . ." The IR interpreted this to mean, in effect, the difference between a plan's projected benefit payments through 2051, including future accruals and future administrative expenses, less all plan resources

[4] For example, we discuss our concerns with the prohibition against retroactive benefit increases first because we suspect we will be among only a few commenters objecting to the prohibition and did not want those concerns lost by discussing them at the end of our comments.

projected to be available to the plan through the end of the 2051 plan year. Plan resources include all pre-application assets, all projected contributions to the plan through 2051, all projected withdrawal liability payments to the plan through 2051, and all earnings on those assets through 2051.

As has been repeatedly noted, the IR's approach to the calculation of the assistance amount—in particular its consideration of all future contributions as a plan asset—is deliberately designed to result in plan insolvency in the 2051 plan year.[5] This is not what Congress intended nor is it what the statutory language requires.[6] Also, the IR is inconsistent with the structure of the funding rules applicable to multiemployer plans; creates an arbitrary application process bereft of realistic measurements to determine assistance, indeed inserting an unsolvable logical bottleneck into the application process; and may result in some of the 18 plans whose MPRA applications were approved choosing not to apply for special financial assistance, a result that would undercut Congress's clearly stated intent to restore benefits suspended under MPRA. Moreover, the ultimate cost to the PBGC will almost certainly exceed the value of the reduction in assistance that the IR will produce. The IR is, in fact, a penny-wise, dollar-foolish construction of the statute.

The minimum funding rules for multiemployer plans generally require that plan contributions for each year be sufficient to cover normal costs for the year, plus amortize the excess of the value of plan liabilities over the value of plan assets over a 15-year period. The normal costs are intended to cover the costs of benefits accrued during the plan year, including benefits that will be paid after the 2051 plan year. The IR in effect usurps plan contributions that Congress intended to pay for post-2051 payments to pay down pre-application plan liabilities.

The statute does not dictate this result, as the preamble to IR seems to suggest, mistaking congressional silence on the issue as a clear signal that Congress wished to undermine the integrity of its multiemployer funding rules and doom all multiemployer plans qualifying for relief to insolvency no later than 2051. A congressional command to ensure payments to 2051 cannot reasonably be construed as a command to forbid payments in 2052 and after, and nothing in the legislative record supports this view. Yet the IR has turned the 2051 date into the actuarial equivalent of a guillotine.

Put another way, Congress intended that the amount of FA should cover 100% of the difference between the cost of benefits in pay status from 2021-2051 and a plan's "assets available to pay plan benefits" for the same period. Unfortunately, the IR in effect says

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5 And this does not take into consideration the problem of the mismatch between the interest rate used to calculate assistance and the lower rate of return on the investment grade fixed income securities in which Congress intended plans to invest, a problem we will consider *infra*.

6 If blind fidelity to the statutory language is the goal, we would argue that the PBGC should simply determine the present value of plan liabilities through 2051 (or perhaps only already accrued plan liabilities) and provide assistance in that amount, without considering the so-called, just invented concept, of plan resources.

otherwise, and creates a built-in shortfall between liabilities and resources, resulting in plan insolvency in 2051.

This result will also subject plans receiving relief to increased intergenerational tensions between older and younger participants and will encourage contributing employers to look for the exits, which the IR will in some cases further facilitate by the inadequacy of the conditions it has placed on the calculation of withdrawal liability.

We also note that there is no way an actuary—or anybody else—can gin up a credible present valuation of employer contributions over the next three decades. There are simply too many unknown variables—indeed, *all* of the variables are unknowable. Who can predict whether an industry will be wiped out by new technology or foreign competition or a new law? Who in 1990 foresaw Amazon and the bankruptcies of retail chains like K-Mart, Sears, Neiman Marcus and JC Penney.[7] And how is the actuary to predict future legislative or regulatory changes that will impact a particular plan? And some public health officials have even suggested that the world might see a major pandemic in the 21st Century, which it ever happened could have an effect on future employer contributions.

The demand to "value" future withdrawal liability payments adds another layer of impossibility. At a minimum, this would require the plan to identify which employers will either go out of business or drop their collective bargaining obligation, the date those employers will do so (plan liabilities change, after all), how much the employer is able to pay, and whether a court or arbitrator will sustain the assessment.

We cannot suggest any way to make this process viable. Neither Generally Accepted Accounting Principles nor the funding rules of the Internal Revenue Code allow a plan to treat future contributions or withdrawal payments as an asset. Nor are they treated as a plan asset for plan withdrawal liability calculations. We might add that when the PBGC books liabilities for its annual financial statement, the agency does not simply use figures derived from its PIMS stochastic forecasts: agency staff scrutinize plans on an individual basis, and a given plan may change from "booked" to "unbooked" several times.

Moreover, the amount of future contributions and future withdrawal liability payments is itself related to the amount of financial assistance a plan will receive. If the IR will not ensure that a plan will survive beyond 2051, the support of current employees for plan participation may diminish. Workers (and their bargaining representatives) are not financial illiterates. Our limited review of internet postings related to ARA eligible plans disclosed that workers in a number of plans are already complaining that the IR guidance forces them to sacrifice tens, or even hundreds of thousands of dollars of contributions over their career with no benefits payable to them after 2051 in excess of PBGC multiemployer guarantees.[8] Active workers may seek to abandon the plan as quickly as they

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[7] In the 1990s, PBGC treated the anticipated rental income from real estate leased to a JC Penney store as high as the earnings on a AAA bond. No longer.

[8] Moreover, given the accrual-based structure of the PBGC guaranty, large swathes of current active workers with vested benefits have already accrued enough service to obtain the full PBGC guaranty.

can, because the value of their lost accrued benefit is only a fraction of the cost of several decades of contribution deductions. And simple economics will lead employers to a similar place, seeking to withdraw from plans.

These potentially corrosive pressures should, logically, substantially reduce an actuary's guess about the level of future contributions. But if such reduced contribution assumptions are accepted by the PBGC and result in an increased amount of financial assistance, the pressures that resulted in conservative estimates of future contributions will be less severe in reality and contributions will exceed the actuarial estimates.

As suggested by others, there is also the risk that some plans that reduced benefits under MPRA will choose not to apply for financial relief, deciding that plan solvency beyond 2051 is too valuable to active employees to surrender in exchange for restoration of benefits. While we hope that no plan would make such a choice, the possibility is difficult to dismiss out of hand, which would result in the continued often severe reduction in benefits of elderly Americans, benefits that the Butch Lewis Act was almost certainly understood to remedy.

The Center believes that a more plausible reading of the statute's instructions would respect the structure of the funding rules and count as a plan asset only the portion of a contribution that exceeds the normal cost of benefit accrual that will not be paid until after the 2051 plan year. Moreover, a close equivalent to this approach, which would also have the virtue of avoiding the essential arbitrariness of trying to predict future contributions, withdrawal liability, and new benefit accruals payable through 2051, would be to disregard as a plan resource post-application normal costs and also disregard all post-application benefit accruals as a benefit payable through 2051.[9]

3. Alternatives to Investment Grade Securities/Investment Allocations/Relationship Between Financial Assistance Funds and Overall Plan Portfolio

The preamble to the IR invites comments on the issues highlighted above. It is our belief that Congress earmarked investment of government assistance funds in specified investments to shelter such assets from not only investment risk generally, but also from market volatility, which can have extreme adverse impacts on plans whose active participant/retiree ratios are unfavorable. Insulation of government assistance against market risk and volatility would ordinarily suggest a conservative approach to the questions raised by the preamble: for example, that the investment allocation of the legacy plan asset portfolio be evaluated for prudence without consideration of the investment-grade fixed

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[9] We have not commented here specifically on the problems of the mismatch between the discount rate specified in the statute and the expected return on the investment grade securities in which special financial assistance must be invested. But we note that we agree with the view the statute can be interpreted reasonably in a way that corrects for this. We are not providing detailed comments in this regard because we understand that PBGC is aware of such arguments and despite the glaring illogic of a discount rate that exceeds plausible rates of return on assets (and will result in plan illiquidity before 2051) has apparently rejected them.

income securities in the segregated account for government assistance; timing restrictions on how quickly the government assistance portfolio can be used to pay benefits; only limited investment alternatives to investment grade securities for the government assistance; and perhaps special restrictive conditions on plans that have in the past taken on significant investment risk without measurably improving long-term return.

But given the interest rate/rate of return disparity in the statute and PBGC's view that it cannot interpret the statute in a way that harmonizes the two for purposes of calculating the amount of assistance a plan will receive[10], we believe that plans must be provided greater investment flexibility with respect to investment government assistance amounts than would otherwise be consistent with congressional intent to limit investment risk.

We cannot offer specific recommendations, but instead offer a general principle that we think should inform specific decisions on the preamble questions. We believe that the animating principle should be to provide plans with sufficient flexibility to design a total portfolio that has an expected return equal to *but not in excess of* the statutory interest rate used to calculate the amount of government assistance. This approach would undoubtedly require more individuation among plans and more ongoing monitoring than is administratively ideal, but this seems the most protective path to allowing plans to achieve an expected rate of return that is consistent with congressional intent that assistance last through at least the 2051 plan year.

We also note that PBGC, the Department of Labor, or perhaps both, might consider guidelines on whether, how often and under what circumstances a plan can sell investment grade securities (or other assets approved by PBGC) from its general legacy portfolio to its segregated account for government assistance and visa versa.

4. Withdrawal Liability

The IR concedes that without the PBGC exercising its authority to place conditions on withdrawal liability, the Butch Lewis Act will reduce withdrawal liability obligations and encourage an employer exodus from a plan. This is because the infusion of lump sum FA will immediately lower the value of a plan's unfunded benefits, and consequently reduce an employer's withdrawal liability. Moreover, the ARA creates two additional perverse incentives: first, the most badly funded plans will have the biggest FA and the greatest percentage decrease in withdrawal liability, and second, the FA's immediate, temporary liability reduction encourages employers to withdraw sooner rather than later. And unions presumably would have only a weak interest in resisting, since retirees are taken care of for a lengthy time period, and active employees can accrue benefits in a new plan.

The IR attempts to counteract these incentives by tinkering with the actuarial valuation of a plan's UVBs. Under the 1980 Multiemployer Act, the plan actuary is supposed to use an array of assumptions that, in combination, reflect past experience and the actuary's best estimate of anticipated future experience. The IR specifies, however, that for withdrawal

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[10] And of course the larger the amount of financial assistance a plan receives, the more profound the implications of the mismatch become.

liability calculations only, the actuary must use the conservative, no-risk discount rates applicable in a mass withdrawal. This will increase the calculated present value of a plan's unfunded liability and thereby, it is hoped, either forestall employer withdrawals or at least extract a painful amount of withdrawal liability. We sympathize with this good intention, but have considerable doubt it will work, or at least work for all plans. For one thing, it is our understanding that at least one large plan already uses conservative assumptions for both funding and withdrawal liability calculations. For this plan, the requirement will have little if any impact on the calculation of a plan's unfunded liabilities. More generally, this special condition will almost certainly be the subject of court challenges, and several recent court decisions have overturned liability assessments that use the soi-disant Segal or "Blended rate" valuation rates, which use similar interest assumptions to value plan benefits not covered by plan assets.[11] Even if the IR is held to be valid, we are unaware that PBGC has done any research to determine whether the requirement is sufficiently potent to ward off withdrawals. Indeed, we believe that the PBGC should consider adding at least three additional conditions to calculation of withdrawal liability: (1) non-consideration of special financial assistance in calculating withdrawal liability; (2) requiring the use of conservative assumptions for a five-year period after the special financial assistance is exhausted; and (3) requiring for a 15-year period that withdrawal liability be no less than it would have been as of the date a plan applied for special financial assistance.

Moreover, we suggest that the PBGC make appropriate and necessary changes in the IR to prevent further damage to local and regional construction industry plans. Under the special definition of a withdrawal in a construction industry plan a construction employer who ceases operations, or transfers operations outside the jurisdiction of its collective bargaining agreement, incurs no withdrawal liability.[12] Obviously, an employer who decides that benefit costs have become too burdensome can just close the shop and be done with pension headaches. In theory, such dropouts should not affect contributions, because all construction is local, so if Corporation A drops out, Corporation B will expand its operations, or a new Corporation C may enter the plan. The reality is otherwise. Contrary to popular belief, many construction plans actually cover a small, discrete geographic area: Pipefitters Local 1 Plan covers county A, Pipefitters Local 99 covers neighboring county B. As the PBGC well knows, in many crafts, an employer who contributes to the Local 99 Plan in County B is allowed to perform work in County A, but contributes to the Local 99 Plan instead of Local 1. Thus, an employer can lawfully transfer operations to the next county, sign up to another plan with lower contribution requirements, and bid on exactly the same work in his former abode, incurring no liability. This phenomenon has already caused the demise of several plans and the IR will exacerbate the problem.

In summary, we respect the efforts and perspectives that went into crafting the IR, but nevertheless believe the IR includes the serious deficiencies discussed above. The suggestions we have made, if adopted, will better conform the PBGC guidance to the statutory language and congressional intent and will result in a healthier, more robust multiemployer system, a system that can be counted on for the long-term. If you have any questions, we would be pleased to respond.

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[11] This is a simplification, but we are preaching to the choir.

[12] ERISA § 4203.

Sincerely yours,

Terrence Deneen
Michael Gordon Fellow
Pension Rights Center

Norman Stein
Senior Policy Consultant
Pension Rights Center

The Pension Rights Center urges the IRS to protect retirement spousal rights

For Immediate Release | Contact: Karen Friedman, 202-320-6518
October 04, 2021 | www.pensionrights.org

The Pension Rights Center (PRC) sent a **comment letter** to the IRS in opposition to efforts to weaken spousal rights to retirement benefits. The Pension Rights Center has been a leading consumer voice working to protect the retirement security of workers, retirees and their families since 1976.
The federal private pension law, ERISA, requires that when a pension-earning spouse dies, the surviving spouse must automatically receive a survivors' pension from a traditional defined benefit pension plan, or be the named beneficiary of a 401(k)-type retirement account, *unless* the spouse had already provided written consent to give up those critical benefits. This consent must be witnessed in the physical presence of a notary or a plan administrator. While spousal pension rights apply equally to both women and men, in reality women are more dependent on spousal benefits for their retirement security than men.

The requirement that there must be in-person, properly-witnessed consent before spouses can surrender their right to retirement benefits has been a linchpin of protecting women's pension rights for nearly four decades. The requirement that the signing process be in the physical presence of the notary or plan administrator has helped prevent and deter employees from engaging in fraud or coercion to get the signature of the spouse (for instance, if the pension-earning spouse wants to get a single life annuity, which would give him more money while he is alive; or he wants to secretly be able to change the beneficiary on his 401(k) plan).

During the worst months of the pandemic – when businesses were shuttered and social distancing was mandatory – it was understandable that the IRS temporarily waived this "physical presence" requirement and allowed retirement plans to accept spousal consents that had been remotely notarized or witnessed online. However, in response to ongoing pressure by business groups, the IRS recently issued a notice (2021-40) indicating it may consider permanently eliminating the important physical presence requirement.

In its comments responding to the IRS notice, PRC asserted that "Permitting remote notarization and witnessing without physical presence was an understandable accommodation during the worst phases of the pandemic... However, it must be recognized that the lockdowns and social distancing that temporarily necessitated this dramatic move are no longer a necessity – notaries are again freely available for in-person notarizations. There is simply no justification for weakening spousal protections and endangering women's retirement security by permanently eliminating the physical presence requirement."

In addition, PRC noted that “Spousal consents are the only circumstance under ERISA where notarization is required. The decision of a spouse to sign away spousal benefits is a life-changing event that requires maximum safeguards. The act of having to seek out and appear in the physical presence of a notary reinforces to the spouse the seriousness of the interests at stake…. Knowing one must appear before a third party, in person, is a significant deterrent to fraud and coercion.” The Center provided evidence of the multiple ways in which remote online notarization is less effective than signing in front of a notary or a plan administrator.

The Pension Rights Center wasn’t the only advocate for workers and retirees to oppose the change. A large group of women’s and retiree organizations, unions and groups representing survivors of domestic abuse **also filed a comment letter**. Those who signed include: the National Women’s Law Center; the Alliance for Retired Americans; APWU Retirees Department, AFL-CIO; National Caucus and Center on Black Aging; National Committee to Preserve Social Security and Medicare; National Domestic Violence Hotline; National Coalition Against Domestic Violence; National Network to End Domestic Violence; National Organization for Women; Social Security Works; Tahirih Justice Center; UFCW International Union; Women's Institute for a Secure Retirement (WISER).

In their comment letter, the groups urged the IRS to end the temporary waiver and restore the physical presence requirement for spousal consent. They concluded, “If the IRS is considering any changes to this long-standing protection, the agency should publish a well-supported proposed regulation in a more formal notice-and-comment rulemaking proceeding, and it should strengthen protections for spouses and not weaken them.”

September 30, 2021

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2021-40)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington D.C.20044

RE: IRS Notice 2021-40, Physical Presence Requirement for Spousal Consents

The undersigned organizations write to express our disagreement and deep concerns that the Service is giving serious consideration to weakening spousal rights to retirement benefits.

Pensions earned and retirement assets saved during a marriage are a marital asset, perhaps the most valuable one a couple owns (other than a home). Federal pension law requires that the spouses of retirement plan participants must automatically receive a surviving spouse pension from a traditional defined benefit pension plan, and must be the named beneficiary of a 401(k)-style retirement account, unless the spouse provides witnessed, signed consent to give up those rights. The requirement for properly witnessed spousal consent to surrender guaranteed rights to retirement benefits has been a cornerstone of protecting spousal pension rights for nearly four decades. Proper witnessing has required the spouse's signature to be affixed in the physical presence of the notary or plan administrator, in order to help prevent and deter participants from engaging in fraud (e.g., using imposters) or coercion to get that signature.

This longstanding spousal protection recognizes both that future retirement security is at stake, and that a very real conflict of interest may exist between the spouses over the form and timing of retirement plan payments. Women reach retirement with fewer assets than men, due to lower pay, a greater likelihood of working for an employer with no retirement plan, and more time out of the workforce spent caregiving for family. In addition, women are more likely to outlive their husbands, and thus need to make their retirement income last longer. As a result, while spousal pension rights apply to both women and men, the right to collect a surviving spouse pension or to inherit a worker's 401(k) balance is disproportionately more important to the retirement security of women than men. The protection is robust because it needs to be: if the participant wants access to retirement savings or a larger retirement income during his lifetime, or even to deprive the spouse of any retirement funds, he may put significant pressure on the spouse to sign away her rights.

When the COVID pandemic shut down businesses and limited face-to-face transactions, it made sense for the IRS to temporarily waive the physical presence requirement and permit retirement plans to accept spousal consents that had been remotely notarized or witnessed online (e.g., Zoom).

Now, however, a substantial portion of the population has been vaccinated, social distancing requirements have been relaxed, businesses have reopened, and notaries are once again available for in-person services. In other words, there is no longer a public health emergency justification for waiving the physical presence requirement, let alone permanently eliminating it.

The entire purpose of in-person witnessing is to validate a signer's identity, and to ensure that the person before them is signing a document knowingly and voluntarily. We have significant concerns about permanent elimination of the physical presence requirement, especially given instances of employee-spouses forging the signature of the non-employee spouse, using imposters posing as the spouse, and coercing or otherwise pressuring a spouse to sign the consent form.

Physical presence is not fool-proof, but the efficacy of remote online notarization platforms to confirm identity is overstated. Their "credential analysis" just checks ID to ensure that the photo is in the right place, the verbiage is correct, and the ID has not expired. Unlike an in-person notary, an online notary cannot look or feel for signs of tampering, or physically inspect the visual (holograms) and tactile (raised lettering) security features of government IDs that are intended to prevent forgeries. Worse, so-called "knowledge-based authentication," which has been widely discredited in an age of widespread hacking, is virtually meaningless as applied to married couples who know key facts (like previous addresses) about each other. Unfortunately, it usually takes many years for evidence of this kind of fraud to come to light.

In addition, remote witnessing is an inferior method for detecting whether the signer is being coerced or pressured. The webcam's field of vision is extremely narrow, and is focused on the signer; it does not "see" others, in the room or just outside but in earshot, who may be exerting undue influence. An in-person notary, in contrast, can observe the entire room and determine whether the employee-spouse or others who may be present appear to be pressuring the non-employee-spouse. Moreover, online interactions make it more difficult to discern cues and read body language in order to gauge diminished capacity or duress. Economic control is a component of domestic violence, which has increased during the COVID pandemic and lockdowns. Advocates for survivors of domestic violence have reported that abusive spouses have prevented survivors from accessing stimulus payments, tax refunds, and other economic benefits. It is not beyond imagination that some have threatened a spouse to get consent to tap retirement funds after the CARES Act gave participants immediate and penalty-free access to their retirement plans.

We urge the IRS to end the temporary waiver and restore the physical presence requirement for spousal consents. However, if the IRS is considering any changes to this longstanding protection, the agency should publish a well-supported proposed regulation in a more formal notice-and-comment rulemaking proceeding, and it should strengthen protections for spouses, not weaken them. Please do not hesitate to contact Amy Matsui, Director of Income Security and Senior Counsel at the National Women's Law Center, should you have any questions (amatsui@nwlc.org).

Sincerely,

National Women's Law Center

Alliance for Retired Americans

APWU Retirees Department, AFL-CIO

National Caucus and Center on Black Aging

National Committee to Preserve Social Security and Medicare

National Domestic Violence Hotline

National Coalition Against Domestic Violence

National Network to End Domestic Violence

National Organization for Women

Social Security Works

Tahirih Justice Center

UFCW International Union

Women's Institute for a Secure Retirement (WISER)

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September 30, 2021

Internal Revenue Service
Attn: CC:PA:LPD:PR (**Notice 2021-40**)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington D.C.20044

RE: IRS Notice 2021-40, Physical Presence Requirement for Spousal Consents

Introduction

For the last 45 years, the Pension Rights Center has been a leading consumer voice working to protect and promote the retirement security of workers, retirees, and their families. In response to IRS Notice 2021-40, the Pension Rights Center files these comments in opposition to making the temporary waiver of the physical presence requirement for spousal consents permanent. Such a waiver would weaken spousal pension rights and undermine retirement income security, especially for women.

The temporary waiver of the physical presence requirement promulgated by the Internal Revenue Service (IRS)[1] is based *solely* on the social distancing restrictions necessitated by a national public health emergency. Once, as now, social distancing constraints have been eased and in-person access to notaries and plan administrators has been restored, that rationale falls away. Hence, the burden to justify any permanent change rests on the industry and business groups[2] (hereinafter "business groups") that have been heavily lobbying Treasury-IRS to eliminate the physical presence requirement for spousal consents.

As we discuss below, the business community's arguments do not hold up, and should not be credited to support any permanent weakening of spousal protections. However, should Treasury-IRS decide to consider proposing any significant changes to its 2006 regulations, such changes should not rest on deference to state law, they should be proposed and developed through full notice-and-comment rulemaking, and several protections stronger than those contained in the temporary guidance should be added.

[1] IRS first issued guidance containing the temporary waiver in Notice 2020-42, which retroactively covered all of 2020. This was followed by two extensions: Notice 2021-03, which extended the temporary waiver through June 2021, and the notice at issue here, Notice 2021-40, which extends the temporary waiver through June 2022. The COVID pandemic's impact on business closings and its imperative for social distancing was the only stated rationale for all of them.
[2] Industry groups, i.e. those with a direct financial interest in this issue such as Notarize and Docusign, and groups representing plans who are the regulated community such as ABC and ERIC, along with general business trade associations such as the US Chamber, are the main proponents of changes to allow remote witnessing. For purposes of convenience, in this letter we refer to both groups as "business" groups.

I. The Physical Presence Requirement Is Central to the Statutory Scheme of Spousal Protections under ERISA

For those workers who are fortunate enough to have accumulated a sizeable balance in an employer-based retirement savings plan, or to have earned a defined benefit pension, retirement plans typically constitute the most valuable asset a married couple owns, perhaps second in value only to a house. Receiving monthly income from a pension or being able to tap retirement savings is important to supplement Social Security and maintain a household's standard of living in retirement. Women's increased participation in the workforce and in employer-based retirement plans have helped narrow the gap in men's and women's retirement incomes. However, because women generally still receive lower pay than men, still spend more time out of the workforce to provide care for family, and are still more likely to work part-time or for a small employer that doesn't offer a retirement plan, they still reach retirement with fewer retirement benefits and assets – yet they must make those assets last over longer life expectancies than men. Consequently, while spousal pension rights under law apply equally to women and men, in reality women are more dependent on spousal benefits for their retirement security than men,[3] making spousal pension rights primarily a women's retirement security issue.[4]

The Retirement Equity Act of 1984[5] established that deferred compensation in the form of retirement benefits and savings are jointly earned marital assets, and that spousal rights to those assets demanded a framework whereby the rights of spouses to share in those benefits are protected. Upon the death of the plan participant, spouses must receive a surviving spouse pension in a defined benefit plan, and must the named beneficiary of the balance in a defined contribution plan. These rights to automatically receive benefits are legal defaults that can only be altered if the spouse knowingly and voluntarily consents, in writing before a notary or plan administrator, to surrender them. Unless there is a valid spousal consent, the participant may not choose a form of payment other than a qualified joint and survivor annuity, and may not name someone other than the spouse as the death beneficiary for a 401(k) balance.

Spousal consent to waive automatic retirement benefits is the linchpin of statutory spousal protections, and Congress structured this protection in the way it did because it recognized that this decision, this ERISA election, is *different*. In this instance, the participant spouse and the nonemployee spouse have a conflict of interest; often there is also a power imbalance between the spouses. Taking a single life annuity or a lump sum from a defined benefit plan provides the participant spouse with more money while alive, and leaves a surviving spouse with less or no benefit at all when the participant dies. Funds drained while the participant is alive, possibly in contemplation of divorce, are funds that will not be available to help support the spouse in retirement. Moreover, the sizeable amount at issue can provide a significant incentive for the participant spouse to commit fraud or coercion to obtain the spouse's consent. This threat is coming

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[3] GAO, *Retirement Security: Older Women Report Facing a Financially Uncertain Future* 10 (July 2020), *at* https://www.gao.gov/assets/gao-20-435.pdf; National Women's Law Center, *Increasing Spousal Protections in Retirement Accounts Would Increase Women's Retirement Security,* n. 3 (Mar. 2014), *at* http://nwlc.org/sites/default/files/pdfs/social_security_spousal_protections_march_2014.pdf; Pension Rights Center, *Understanding Survivor Benefits in Private Retirement Plans* (Nov. 2, 2020), *at* https://www.pensionrights.org/publications/fact-sheet/understanding-survivor-benefits-private-retirement-plans.

[4] For this reason, for ease of writing, we refer to the participant as "he/his" and the spouse as "she/her," although spousal rights apply to both sexes, and they apply equally to same-sex marriages.

[5] Pub. L. 98-397, 98 Stat. 1426 (1984) (26 U.S.C. § 417, 29 U.S.C § 1055).

from *inside* the home, not from some hacker or identity thief outside the home. The spouses likely receive mail at same address, may use same computer, and even share passwords and PINs. These "opposing" parties know a lot of personal information about each other, significantly limiting the utility of using traditional methods of ID verification.

Spousal consents are the only circumstance under ERISA where notarization or witnessing by plan administrator is required. The decision of a spouse to sign away spousal benefits is a life-changing event that requires maximum safeguards. The act of having to seek out and appear in the physical presence of a notary reinforces to the spouse the seriousness of the interests at stake, and the importance of the decision to waive retirement rights or to withhold consent. Knowing one must appear before a third party, in person, is a significant deterrent to fraud and coercion. This is perhaps why stories of problems with in-person consents are relatively rare. By contrast, going online where someone from a call center uses third-party software to process a document may communicate that this transaction is not much more consequential than logging on to your bank's website to check your account balance.[6]

It is true that some consumers, including some spouses, may prefer to have the convenience of an online option. But in this case, for such a consequential decision, the need for the protections conveyed by the current in-person requirement outweighs any minor convenience. The IRS Notice asked whether there are costs and burdens associated with the physical presence requirement that support modifying the requirement on a permanent basis. There are not. For the spouse whom the physical presence requirement was enacted to protect, the cost is usually free or nominal,[7] and the burden is minimal – this is a one-time decision requiring a one-time visit. Nor are there are any costs or burdens for the plan to maintain the physical presence requirement, since plans must still furnish an explanation regarding rights and effects of a waiver to the participant, and must process the spousal consent form whether on paper or in digital form.

During the last rulemaking on this issue, business groups urged Treasury-IRS to dispense with the physical presence requirement. The agency rejected that suggestion,[8] concluding that the statutory scheme requiring physical presence was the more effective method for authenticating identity, precluding fraud, and protecting spousal rights. That was the right decision then and remains the right decision now.

There is no sufficient rationale for changing this regime. Initially, IRS permitted remote online notarization (RON) as a *temporary* measure to deal with a national public health emergency. The agency justified the temporary waiver of the physical presence requirement solely based on the distancing directives and lockdown restrictions imposed by COVID, and it has not changed that rationale in any of its subsequent temporary extensions.[9] Although the pandemic is not completely

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[6] "Take a picture of your government issued ID, answer a few questions, and Notarize will confirm your identity in seconds." Notarize, How Notarize Works, *at* https://www.notarize.com/signer/how-to.

[7] By contrast, remote online notarizations cost much more than in-person notarizations. National Notary Ass'n, *2021 Notary Fees by State*, at https://www.nationalnotary.org/knowledge-center/about-notaries/notary-fees-by-state.

[8] *See* Treas. Reg. § 1.401(a)-21(d)(6); preamble to regulations at 71 Fed. Reg. 61877, 61882, (Oct. 20, 2006).

[9] For this same reason, we can discern no rationale for extending the temporary waiver to June 30, 2022 as per Notice 2021-40. Nor should IRS extend the waiver through any notice-and-comment period, as requested by the US Chamber. Letter from Chantel Sheaks, VP of Retirement Policy, US Chamber, to IRS, Re: Permanent Relief for Remote Witnessing Procedures, at 1 (Apr. 23, 2021), *at* https://downloads.regulations.gov/IRS-2020-0049-0003/attachment_1.pdf. Instead, IRS should terminate the temporary waiver and restore the physical presence

gone, most businesses have reopened, including restaurants, stadiums, banks, stores and other public places. Participants and spouses can already access notaries and even plan administrators in person, so the rationale for the temporary waiver is no longer present.

Business groups are attempting to use the temporary waiver to push for a permanent elimination of the in-person rule, but relentless lobbying for what amounts to a business preference that would weaken the rules is not a rationale for removing the important protection the rule provides for spouses. The burden of persuasion to justify any change with reasoning and evidence should be on the proponents of the change. As we explain below, they have failed to satisfy that burden and demonstrate why the physical presence standard should be weakened.

II. Remote Online Notarization Is a Less Secure Means Protecting Spouses from Fraud or Coercion than In-Person Witnessing

In its Notice, IRS asks how increased fraud, spousal coercion, or other abuses may be likely to result if the physical presence requirement is permanently weakened. While in-person witnessing is not foolproof, RON by its design expands the risk of fraud and coercion, making it less capable of authenticating identity and ensuring the spouse is signing willingly.

A. Authentication of Identity

Business groups assert that remote online notarization protects consumers from fraud because it relies on "credential analysis" and "identity proofing."[10] With RON, the signer may or may not hold their ID up to the camera so that the notary can visually check that the signer's appearance matches the ID photo. However, according to the National Notary Association, "…most experts believe it is inherently insecure to allow a signer to be identified for a RON merely by flashing an identification card on camera…."[11] RON systems may also or instead deploy credential analysis, which sends an uploaded photo or scan of an ID (sometimes the notary may never even see the ID) to a private, third-party database used by the RON platform, which merely checks the ID to determine if the photo is in the correct place, the content matches up to the information in the database, and the date on the ID has not expired.[12] Some RON platforms use facial recognition software, but that has proven to be unreliable for women, people of color, and older adults.[13]

On the other hand, with in-person witnessing, the notary or plan administrator actually handles the government identification being presented by the signer; they can feel whether the thickness of the

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requirement by no later than the end of 2021, regardless of whether it decides to stick with its current regulations or propose any long-term regulatory changes.

[10] *See e.g.*, Letter from Renée Hunter, General Counsel, Notarize, Inc. to IRS (Feb. 5, 2021), *at* https://www.regulations.gov/comment/IRS-2020-0049-0005 [*Notarize Letter*]; Letter from Doug Luftman, VP & Deputy General Counsel, DocuSign to IRS (May 13, 2021), *at* https://www.regulations.gov/comment/IRS-2020-0049-0004. It is important to keep in mind that state laws on RON vary; some are looser or stricter than others in their requirements for identity authentication procedures.

[11] David Thun, "How Do You Identify Signers For A Remote Online Notarization?," *Notary Bulletin* (Nat'l Notary Ass'n, updated Apr. 20, 2021), *at* https://www.nationalnotary.org/notary-bulletin/blog/2020/04/identify-signers-remote-online-notarization.

[12] Comment of Matt Miller, President, California League of Independent Notaries, in telephone conversation with Deborah Chalfie, PRC Volunteer, on Sept. 9, 2021.

[13] Comments of Becca Cramer Legislative Coordinator & Advocate, ACLU California Action, *Secretary of State Dr. Weber Hosts Virtual Information Briefing on Remote Online Notarization* (Video at 1:08:50) (Apr 29, 2021), *at* https://www.youtube.com/watch?v=4ViIcqrR918.

ID is off, or determine whether it appears to have been tampered with. They can inspect the ID to check the presence of visual security features such as holograms and tactile security features such as raised lettering. They can compare the photo to the signer – something that is more difficult to do online[14] – and can visually compare the signer's signature to the signature on the ID.

The other element of identity authentication utilized by RON systems is knowledge-based authentication (KBA), a process by which the signer is asked questions commonly generated from a private database such as from credit reporting agencies. These multiple-choice questions typically ask, for instance, about prior towns or streets of residence, one's mortgage balance, whether one has ever had a certain brand of credit card – or even where you met your spouse (!). Knowledge-based authentication has been criticized and abandoned as ineffective in an age of widespread data-mining and hacking,[15] but it almost certainly meaningless as applied to married couples, who know key facts about their each other's lives and pasts. According to one national expert, "on most platforms, there's a KBA session that happens *prior to that person meeting the notary*,"[16] which means it would be incredibly easy for the employee-spouse to answer the questions on behalf of the nonemployee-spouse prior to the remote session with the notary occurring. For several reasons, KBA is an unreliable way to "identity proof" when it comes to preventing fraud in the execution of spousal consents.

B. Prevention of Coercion and Duress

The risk of coercion or duress of the signer is materially greater with RON than with a transaction that happens in the physical presence of the notary/witness. The narrow view of the webcam precludes the notary or plan administrator from seeing everyone in room or even nearby, let alone just outside the room, where an abusive spouse could be exerting undue influence on the signer. Nor can they see the signer's hands – someone else could be selecting answers to the KBA questions for the signer or electronically "signing" the document by clicking a box on the digital form – or whether the signer is being texted on their cellphone lying on the table.

Business groups assert that coercion is of no greater concern with remote notarizations than with those performed in the physical presence of the notary. In fact, Notarize, a national RON platform company, labels the concern that RON can't detect duress (due to the camera's limited view) a "*myth*."[17] Yet, they also concede that an abusive spouse or other coercer could be in the room out of view of the camera. Their response to this is to simply assert that even in-person notaries cannot know what is happening away from the "signing table," thus RON is no worse.[18]

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[14] Bill Analysis re: AB 199, California Online Notary Act of 2019, Assembly Comm. on Judiciary, 10 (Apr. 20, 2019), *at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB199#.

[15] *See e.g.*, GAO, *Data Protection: Federal Agencies Need to Strengthen Online Identity Verification Processes* (May 2019), at https://www.gao.gov/assets/gao-19-288.pdf; Mike Baukes, "Everybody Knows: How Knowledge-Based Authentication Died," Forbes (Jan. 22, 2018), *at* https://www.forbes.com/sites/forbestechcouncil/2018/01/22/everybody-knows-how-knowledge-based-authentication-died/?sh=44dc33514eee.

[16] Kelly Rush, "How to prevent fraud as a Remote Online Notary," *Notary Bulletin* (Video at 04:23) (Sept. 2, 2020) (emphasis added) at https://www.nationalnotary.org/notary-bulletin/blog/2020/09/how-to-prevent-fraud-as-a-remote-online-notary [*How to prevent fraud*].

[17] Andrew Macdougall "5 Myths About Remote Online Notarization" (*Notarize*, July 31, 2019) *at* https://www.notarize.com/blog/5-myths-about-remote-online-notarization.

[18] *Id.*

It is certainly true that, even with an in-person transaction, the notary may not be aware of threats previously made by an abusive spouse or duress imposed by exploitive family members. However, at least an in-person notary can observe and better read what is happening in or near the room at the time – whether anyone else is present and the nature of their interactions with the signer. In addition, the in-person notary can more easily "read the room" and detect nonverbal cues and body language that may reveal duress or lack of capacity than is possible to do remotely on camera.[19] It is also easier for the notary to clear the room to question the signer, or even refuse to notarize the document if not convinced the signature is voluntary. It is common sense that permanently eliminating the physical presence requirement will increase the opportunities for coercion in the execution of spousal consents. And, coming out of a pandemic in which reports of economic coercion of spouses increased,[20] this is exactly the wrong time to weaken spousal protections against coercion.

C. The Efficacy of Remote Online Authorization Is Overstated

The business community states that they are aware of no evidence that the temporary allowance of remote notarization of spousal consents has led to an increase in fraud or coercion.[21] Even the Notice asks "whether there is evidence that the temporary removal of the physical presence requirement" has resulted in fraud, spousal coercion, or other abuse…."[22] However, it is wholly unrealistic and spurious to expect that any evidence of wrongdoing involving remote notarization/witnessing of spousal consents would have surfaced so soon.

The Pension Rights Center and the Pension Counseling and Information Projects, which help individuals with retirement income problems in 31 states, have extensive experience with calls where a spousal consent is at issue. It often takes years, even decades, for wrongdoing (especially fraud) related to spousal consents to surface (even with a physical presence requirement), and can take years to investigate and resolve. For instance, the Western States Pension Assistance Project informed us about a case they handled from 2019-2021. An 89-year-old surviving spouse called for help because her deceased husband's pension plan wouldn't give her any information about his pension without a court order, telling her that her husband had chosen a single life annuity, yet the plan wouldn't send any proof that she had signed a waiver. It wasn't clear what the husband had submitted that led the plan to believe he was entitled to a single life annuity, but was clear is that it had all happened decades earlier. He had retired in 1987 – *32 years* before a survivor benefit would ever have been relevant. Ultimately, the plan settled and paid her a lump sum equal to the amount she would have been due as the surviving spouse without a waiver.

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[19] Sasha Riedisser & Douglas Stanley, "Litigation Risks of Covid-19 Remote Witness and Notary Laws," *JDSupra* (Apr. 17, 2020), *at* https://www.jdsupra.com/legalnews/litigation-risks-of-covid-19-remote-46324/.

[20] *See e.g.*, **"**Domestic Abusers Controlling Virus Relief Checks Raise Red Flags," *Bloomberg Daily Tax Report* (June 25, 2020), *at* https://news.bloombergtax.com/daily-tax-report/domestic-abusers-controlling-virus-relief-checks-raise-red-flags; Karen Nikos-Rose, *COVID-19 Isolation Linked to Increased Domestic Violence, Researchers Suggest Financial Stress Contributes* (UC Davis, Feb. 24, 2021) *at* https://www.ucdavis.edu/news/covid-19-isolation-linked-increased-domestic-violence-researchers-suggest; Leah Rodriguez, "Domestic Violence Increased in the US by 8.1% During the COVID-19 Pandemic", Global Citizen (Mar, 2, 2021), *at* https://www.globalcitizen.org/en/content/domestic-violence-covid-19-increase-us-ncccj-study/.

[21] *See* Coalition Letter to Treasury & IRS on Remote Notarization, at 2 (U.S. Chamber of Commerce, Oct. 1, 2020) *at* https://www.uschamber.com/sites/default/files/joint_letter_on_remote_notarization_final_pdf_10-1-20_00328520.pdf [*Coalition Letter*]; Letter from James Barr Haines, SVP & Deputy General Counsel, Fidelity, to IRS, at 2 (Jun. 1, 2021), at https://www.regulations.gov/comment/IRS-2020-0049-0006.

[22] IRS Notice 2021-40 at 3.

In fact, remote online notarization is itself such a new, unproven technology[23] that it would be extraordinary if failures from its use in *any* type of transactions would have yet shown up and become publicly acknowledged.[24] Only a few states had adopted state RON laws by 2017;[25] most of the growth has been very recent.

The bottom line is that problems are more likely to happen with RON due to the kinds of shortcomings discussed above. Trade groups under the auspices of SPARK conceded this when they first requested the temporary waiver,[26] and the Pension Rights Center believes that the number of cases will increase with remote witnessing. Once the survivor pension or 401(k) balance is gone, the spouse is unlikely to be able to recover it unless the plan can be shown at fault. If the consent form appears to be in good order, then the plan will likely be off the hook and the nonemployee spouse has little recourse against a deceased spouse or a spouse who is alive but has depleted the funds. Moreover, the time it takes to bring legal action anyone may not be time that an older widow has. Thus, meaningful prevention and deterrence are critically important for spouses.

There is one aspect of remote online notarization that theoretically could strengthen protections over in-person interactions: many (but not all) states that have adopted RON require an audio-visual recording of the live, remote notarization to be made. It is likely true that such a recording deters malfeasance and creates a record that could be used as evidence in the event questions later arise. Unfortunately, however, RON laws undermine the potential of this additional safeguard by assigning the recording to the wrong custodian and requiring its retention for far too short a period to make it suitable for spousal consents.

Remote online authorization statutes typically assign responsibility for retaining the recording either with the notary (third-party RON software platforms also often offer to store recordings). Since notaries come and go, or the signer may not recall who handled the notarization, relying on RON to store and produce important retirement-related documents would be an empty protection. Further, even if a remote notary was still in business and locatable many years later, RON laws typically require a retention period of only 5-10 years.[27] This is wholly inadequate given the context here: by definition and as discussed above, it takes many years, often decades, before spouses are made aware of problems in the consent process.

It is worth noting that, to the extent that Treasury-IRS is persuaded that a photographic or audio-visual recording of a consent form being witnessed would help strengthen spousal protections from fraud and coercion, there is nothing to prevent the agency from adopting a recording requirement

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23 "RON is a new development in the notarization field." *Proving a Real Signature in a Surreal World: Notarization Concerns in a Pandemic* (McGuire Woods, Apr. 6, 2020), *at* https://www.mcguirewoods.com/client-resources/Alerts/2020/4/proving-real-signature-surreal-world-notarization-concerns-pandemic.

24 Comment of Matt Miller, President, California League of Independent Notaries, in telephone conversation with Deborah Chalfie, PRC Volunteer, on Sept. 9, 2021.

25 *See* Nat'l Ass'n of Secretaries of State, *Remote Electronic Notarization*, *at* https://www.nass.org/initiatives/remote-electronic-notarization.

26 Letter from Tim Rouse, Executive Director, The SPARK Institute, Inc. to Treasury, IRS and EBSA, at 7 (Mar. 23, 2020), *at* https://www.sparkinstitute.org/wp-content/uploads/2020/03/SPARK-Institute-letter-requesting-coronavirus-relief-3-22-20-final.pdf.

27 *See* American Land Title Association, *Remote Online Notarization FAQs*, at 4 (Feb. 1, 2021) *at* https://www.alta.org/file.cfm?name=Remote-Online-Notarization-FAQs--February-2021.

for *in-person* notarization/witnessing transactions. Weakening spousal protections is not a necessary predicate for requiring additional documentation.

III. Spousal Consent Rights Should Not Be Defined by a Patchwork of State Laws

Proponents of permanently eliminating the physical presence requirement argue that state RON laws are perfectly fine, and that there is no need for Treasury-IRS to reinvent the wheel. Rather, they argue that IRS should continue the approach it took for the temporary guidance: if RON is recognized under state law, then any spousal consent notarized in compliance with the notary's state law would comply with and satisfy ERISA.[28] The Pension Rights Center strongly disagrees with this approach and this argument.

On a practical level, deference to state laws on remote online authorization would produce a logistical nightmare. RON has not been adopted by all states, and where it has, the laws vary widely in procedural protections. It is unclear how this would work for employers with plans that cover employees in different states. This hodgepodge would be compounded by the fact that plan administrators are not subject to any rules on remote online notification and do not have or need any special software for witnessing spousal consents. It is not a satisfactory answer to this problem to say that the Treasury-IRS should simply adopt regulations that would "harmonize" plan administrators with state RON laws;[29] state laws vary, and notaries public play totally different roles than plan representatives. The IRS permitted such a patchwork under its prior notices, but those waivers, far from ideal, were temporary, not permanent.

More significant, there is no sound *legal* rationale under ERISA preemption and the Retirement Equity Act to permit divergent state laws to govern such an important and longstanding federal right. In this area of the law, ERISA preempts. For instance, ERISA provisions that require alternate payees to obtain Qualified Domestic Relations Orders (QDROs) or that specify which spouse may be entitled to a share of a retirement benefit in case of remarriage prevail over divergent state domestic relations laws.[30] ERISA does not defer to them or vary a spouse's rights according to state law. Even if Treasury-IRS were to consider allowing a remote witnessing alternative to the physical presence requirement, it should not entertain or tolerate any approach to this issue that would allow federal spousal rights to vary or be undermined based on state notary laws. Again, spousal consents are *different* from all other elections under ERISA. To fulfill the letter and the spirit of the law, Treasury-IRS needs to retain strong regulatory standards – like the physical presence requirement -- that apply across the board to all notaries and plan administrators.

IV. Federal Standards Applicable to Spousal Consent Should Be the Result of Full Notice-And-Comment Rulemaking

The issue of whether the standards that apply to spousal consents should be modified at all – and if so, whether to strengthen them or to weaken them – raises questions about the appropriate process

[28] Joint Letter re: Permanent Relief for Remote Witnessing Procedure to IRS, at 2 (U.S. Chamber of Commerce, Apr. 19, 2021), *at* https://www.uschamber.com/sites/default/files/joint_letter_on_remote_notarization_notice_2021-03_final_apr_19_2021_00341312.pdf [*Joint Letter*]; *Coalition Letter*, *supra* n. 21, at 2, *id.*
[29] *Notarize Letter*, *supra* n. 10, at 3.
[30] *See e.g.*, *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 555 U.S. 285, 129 S.Ct. 865 (2009); *Egelhoff v. Egelhoff*, 532 US 141, 121 S.Ct. 1322 (2001).

Treasury-IRS should follow in making any changes. Perhaps the most alarming of the arguments put forth by the business groups is that the IRS should adopt what would amount to a major change in the 2006 regulations via a declaration by the Commissioner in guidance instead of undertaking notice-and-comment rulemaking. Citing Treas. Reg. § 1.401(a)-21(d)(6)(iii), the business groups urge IRS to simply delegate the matter to Commissioner[31] to officially declare that remote witnessing offers "the same safeguards" as those provided by physical presence, and so announce a permanent elimination of that requirement in guidance without notice and comment, or "if necessary, only subject any *additional* terms & conditions to notice & comment."[32]

First, while we appreciate that IRS did prescribe some procedural protections in its temporary guidance on remote witnessing, the agency largely relied on state RON laws and procedures; we disagree that these protections provide the same safeguards as physical presence. As discussed above in Section II, RON is a less reliable method than physical presence for validating the identity of the signer: "credential analysis" is superficial compared to in-person inspection of the ID, and knowledge-based authentication is completely insufficient in the context of a transaction between intimates or close family members who have a conflict of interest. Nor does RON provide equivalent safeguards against coercion or duress that are nearly as effective as physical presence. "While the entire transaction will be recorded, you can only record what the camera sees. Others might be in the background or standing off to the side, influencing or coercing the signer to take part in a transaction they don't understand or approve…."[33]

Second, even if IRS is inclined to think that the requirements for remote witnessing are just as protective as physical presence and is considering proposing elimination of the need for physical presence, it should be done though "regular order," with notice-and-comment rulemaking for its entire proposal, not solely for any added protections on top of what it imposed in its temporary guidance. The Pension Rights Center applauds the fact that IRS has so far stood up to the business community's demands to short-circuit the regulatory process for weakening such an important protection. Both Notices 2021-3 and 2021-40 state that regulatory changes, not Commissioner declarations, are contemplated.

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[31] In regard to the IRS Commissioner, the Joint Letter sent by business groups last April (*Joint Letter*, *supra* n. 28, at 1-2) and others claimed that the IRS Commissioner Rettig expressed strong support for permanent elimination of the physical presence requirement in a Ways & Means Oversight Subcommittee hearing held on March 18, 2021, available at https://waysandmeans.house.gov/legislation/hearings/oversight-subcommittee-hearing-irs-commissioner-2021-filing-season. This is utterly false; the letter took the Commissioner's comment out of context and misrepresented it. The relevant exchange runs from about 55:15-57:07.

Rep. Walorski did indeed ask the Commissioner about remote notarization at about 55:15 min. into the hearing. She stated that Indiana had been a leader on RON, then she asked the Commissioner how remote notarization was going, saying she had heard about some consumer protection issues. She asked whether the IRS had heard of any problems with expanded use of remote notarization, and whether it was something he would consider making permanent.

Apparently, Commissioner Rettig misunderstood the question; he clearly thought the question was about opportunities for *customer-IRS* online interactions. He said that the idea of making "this" and many other avenues for communications and interactions *with the IRS* permanent is a good idea. He said he was not aware of any issues that would prevent us from doing "it," referring to *opening up the agency* (not plans or notaries) electronically. As if driving home the point that he was referring to IRS interactions with the public, he said "we will not abandon traditional means of communication." He never once mentioned non-IRS services, or state laws, or notaries, or retirement plans, or anything else related to remote online notarization, and thus the quotes cited by the business groups are highly misleading.

[32] *See e.g.*, *Joint Letter, supra* n. 28, at 1, 3.

[33] *How to prevent fraud*, *supra* n. 16.

Full-on notice-and-comment rulemaking, including a public hearing, was the method by which Treasury-IRS retained the physical presence rule in 2006, and it is the method by which it should make changes, if any, to the rule. Notice 2021-40 was framed akin to a Request for Information type of inquiry, asking questions the agency wants to see addressed rather than advancing a proposal for the public to comment on. The next step should be as stated in Notice 2021-40: announce that the current physical presence requirement will be retained, or propose modifications to it "as part of the regulatory process that will include the opportunity for further comment."[34]

In addition to publishing a regulatory proposal subject to notice-and-comment, the Pension Rights Center advocates that Treasury-IRS propose that stronger protections be added to current spousal consents.

A. Current Protections Should Be Strengthened for Spousal Consents

As a preliminary matter, Treasury-IRS should retain all of the current safeguards specified in § 1.401(a)–21 of the Treasury regulations, e.g., effective access to electronic media, rights to paper, record retention, etc. for all spousal consents (however executed). There are also ways to improve the security of the spousal consent process executed in the physical presence of a notary or plan administrator.

- Strengthen (d)(3) authentication requirements - *Regardless of how the spousal consent is to be witnessed*, plans should be required to send the nonemployee spouse documents that are *separate* from those sent to the participant, in a manner that *ensures actual receipt* by the spouse, and in a manner that precludes someone other than the spouse from getting it.
    - Separate explanation – Spouses should be entitled to receive explanations or disclosures about spousal rights that are sent separately to the spouse, rather than being dependent on receiving them from the materials sent to the participant. The disclosure should explain the nature of the default form of benefits and their waiver, explain the consequences of giving vs. not giving consent, include a prominent warning that signing is voluntary, specify limits on the ability to revoke, and include other information in line with Treas. Reg. § 1.417(a)(3)-1.
    - Separate consent form – Typically, the participant's election of a beneficiary or a desired form of payment and the spouse's consent to waive spousal rights are on same form, even though the participant's election and signature need not be witnessed/notarized. This can enable participants to change the form after the consent is obtained and witnessed (one of the pension counseling projects had a case like this), and normalizes the presence of the employee-spouse during the witnessing/notarization of the spouse's consent, which is not ideal from the standpoint of coercion concerns. Plans should be required to send separate election forms for participant elections and spousal consents.
    - Separate delivery preferences - A participant's preference for delivery of disclosures on paper vs. electronically should not attach to the spouse. Separate disclosures and forms as per the above should be on paper by default, or if the spouse separately opts in to electronic disclosure, the forms should be delivered as pdf *attachments*. Access to these documents should not depend on the spouse being alerted to their availability on a website and having to download them.

[34] Notice 2021-40 at 3.

  - Other measures – Even if a consent will be e-signed, the notary/plan administrator should ask for and compare the signer's "wet" signature made with a pen on paper with the signature on the ID, just as they compare the signer's appearance with the photo on the ID. In addition, Treasury-IRS should consider adding some sort of multi-factor authentication procedure (e.g., with a cellphone) to the process that does not rely on factual, personal knowledge about the spouse.
- Require and retain visual record – For consents executed in the physical presence of the notary or plan administrator, requiring the witness to take a photo or short video of the spouse (and anyone else present) would likely be a further deterrent to fraud or coercion. For those conducted remotely, an A-V recording should be made of the entire transaction. In both cases, the notary should be able to keep a copy, but the visual record should be transmitted to and retained by the plan, attached to or associated with all other plan records for that participant. Moreover, the plan should be required to retain that visual record for the lives of the participant, spouse, and any other named beneficiary or alternate payee, to ensure that that the benefits due can be determined and paid out.
- Record retention and access – Plans should be required to retain all critical plan records related to the determination and payment of benefits indefinitely for the lives of the participant and any beneficiaries. All records should be required to be supplied, upon request and within a reasonable time, to any beneficiaries or their representatives, at no charge. In the event that a plan can't or won't produce the spouse's consent form, it should be presumed that consent was not given and the plan should be liable to pay the amount equal to the separate benefit that would have been due to the surviving spouse.

B. If Remotely Witnessed Spousal Consents Are to Be Considered, Additional Protections Must Be Incorporated

If Treasury-IRS concludes that it should consider proposals to permit remote witnessing without physical presence, it should begin by retaining relevant portions of its current regulations (e.g., effective access), it should adopt the added protections recommended above, and it should retain all of the types of protections it specified in the temporary guidance for plan administrators – live audio-visual conference that allows direct interaction, same-day transmission of signed document to witness and acknowledge document sent back to signer – and apply them to notaries as well. Furthermore, the agency should impose additional protections that apply to any remote witnessing by both notaries and plan administrators. These include:

- Spouse's decision - During the worst months of the pandemic, remote witnessing may have been a necessity, but with the restoration of in-person access to notaries and plan representatives, it is simply a *convenience*, one that we assert is far outweighed by the protections that attach to physical presence. Treasury-IRS should specify that the use of remote witnessing is within the *sole* discretion of the spouse – plans may not require it, participants may not dictate it. The spouse should be informed of this in the separate disclosures sent to spouses (urged above).
- Plan's decision - Moreover, remote witnessing should be an additional option permitted for qualified plans, not a mandate on plans. If a plan is concerned about increased risks attendant to remote witnessing, it should be free to specify in plan documents that it will not recognize remotely witnessed spousal consents.

- Limits on alienation of benefits without physical presence - The unique dynamics and role of spousal consents justify placing substantive limitations on waivers of spousal rights executed remotely.
  - Limitations on lump sum payments from defined benefit plans – If a participant wants to take a lump sum form of payment from a DB plan, and the spousal consent is not conducted in person, the amount of the lump sum distribution/rollover taken by the participant should be limited to an amount that would preserve a lifetime survivor annuity benefit for 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.
  - Limitations on beneficiary changes in DC plans - If a participant wants to change the beneficiary of a DC account balance to a nonspouse, and the spousal consent lacks physical presence, the beneficiary change should only apply to half of the account balance, and the nonemployee spouse should remain the beneficiary of the other half. This limitation would represent a retreat from the spouse's current rights to the entire balance upon the death of the participant, but at least it provides some safety against faulty remote witnessings/notarizations.
- Bolster post-consent confirmations – The temporary guidance already required the plan administrator to send an acknowledged signed copy of the consent form back to the spouse for her records, in conformance with § 1.401(a)–21(c). Instead, both notaries and plan administrators who remotely witness a spousal consent should be required to securely send the spouse a paper copy of the signed and acknowledged election, in addition to any electronic copy provided.
- Impose liability where it belongs - Already, if a plan administrator makes a mistake e.g., accepts an obviously forged consent, the plan is liable to make the spouse whole. Yet, although the RON notary is a mere intermediary between the signer and the platform, RON platforms usually insulate themselves from liability and place all of it on the notary. If Treasury-IRS accepts RON, it should make clear that the *platform* is liable for any problems, NOT the notary. For instance, if a fake ID is used but the plan couldn't have known and paid out, the platform should be required to make the spouse whole for entire amount the spouse would have received if the platform had not accepted the fake ID.
- Limit platform use of data – With all of the hacking of financial and other databases happening on almost a daily basis, platforms should be forbidden from sharing, selling, mining, or using for marketing purposes any data it captures as a result of the remote notarization transaction, and it should be made liable to the individual signer if any data is lost, stolen, manipulated or hacked.

Conclusion

Permitting remote notarization and witnessing without physical presence was an understandable accommodation during the worst phases of the pandemic. IRS based its waiver on the pandemic, and the pandemic alone. It must be recognized, however, that the lockdowns and social distancing that temporarily necessitated this dramatic move are no longer necessary – notaries are again freely available for in-person notarizations. There is simply no justification for weakening spousal protections and endangering women's retirement security by permanently eliminating the physical presence requirement.

As we have argued, and as Treasury-IRS has previously recognized, spousal consents regarding retirement benefit elections are different from other disclosures and elections, due to the conflict of interest and intimate relationship between the parties. Physical presence protects against fraud and coercion in the execution of those consents. Remote online notarization laws have proliferated during the pandemic and are now in most states, at least temporarily. However, there are certain cases in which remote witnessing is inappropriate, and spousal consents should be at the top of that list. In fact, we urge Treasury-IRS to strengthen its *current* regulations.

Nevertheless, in the unfortunate event that Treasury-IRS is inclined to consider weakening the law to allow remote witnessing, the agency must bolster protections well beyond those provided in the temporary guidance. It should apply those protections to both plan administrators and notaries, and it should follow full notice-and-comment rulemaking to propose and justify them.

Thank you for the opportunity to share our views.

Sincerely,

Karen D. Friedman
Executive Director

Karen W. Ferguson
President

PENSION RIGHTS CENTER

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October 14, 2021

Submitted Electronically via the Federal eRulemaking Portal at Regulations.gov

Internal Revenue Service
Attn: CC:PA:LPD:PR (Revenue Procedure 2021-30)
Room 5203, P.O. Box 7604,
Ben Franklin Station,
Washington, D.C. 20044

RE: Revenue Procedure 2021-30

Ladies and Gentleman:

The Pension Rights Center[1] and Covington & Burling LLP[2] are pleased to respond to the request by the Internal Revenue Service ("IRS") to comment on Rev. Proc. 2021-30, which updated selected correction procedures for benefit overpayments under the Employee Plans Compliance Resolution System ("EPCRS"). For decades, EPCRS' overpayment recovery procedures have upended the retirement security of countless innocent retirees. While the new correction procedures adopt important improvements over prior iterations, they don't go far enough to protect innocent retirees from destructive—and unnecessary—overpayment recovery actions that will still occur under the new rules.

We appreciate IRS's recognition for the first time in this latest iteration of ECPRS that the minimum funding rules ensure that a defined benefit plan automatically is made whole for overpayments without the need for separate recovery efforts—thereby making recovery of overpayments unnecessary to protect either other plan participants or the financial condition of the plan. Indeed, in many circumstances, as a result of employer contributions under the minimum funding rules alone, a plan will end up

[1] The Pension Rights Center is a Washington, D.C. non-profit consumer organization that for the last 45 years has been dedicated to protecting and promoting the requirement security of American workers, retirees, and their families.

[2] Covington & Burling LLP is an international law firm headquartered in Washington, D.C., which advises many of the nation's largest employers on employee benefits matters, including matters related to EPCRS.

better funded as a result of an overpayment than if the overpayment had not occurred.[3]

Notwithstanding this recognition, EPCRS provides plans with only limited opportunities to avoid being compelled to make duplicative recoveries. To avoid such compulsion, most defined benefit plans will need to rely on the contribution credit correction method introduced in this latest iteration of EPCRS. However, we understand from experienced actuaries that the cost of performing the complex calculations needed to satisfy this correction method in many cases will exceed the amount of the overpayment at issue—in effect, making the contribution credit correction method unavailable in practice to plans and imprudent for them to pursue.

As a result, most defined benefit plans will still be compelled to recover overpayments in far too many overpayment scenarios—even though doing so is not necessary to protect other plan participants and, in fact, will result in a double recovery by the plan. Yet where plans do seek recovery, EPCRS fails to provide innocent participants adequate protection from common, and onerous, recovery demands, including:

- No limit on the length of time since the overpayments occurred,
- No laches on the plan's failure to timely identify the overpayment,
- No consideration of the hardship recovery would impose on the participant,
- No restrictions on seeking recovery via threats of litigation or through collection agencies,
- No requirement to take into account the participant's lack of culpability for the overpayment,

[3] By contrast, EPCRS does not recognize that existing law also ensures that a defined contribution plan is made whole for any loss suffered by other participants as a result of an overpayment. As an initial matter, not every overpayment from a defined contribution plan causes a corresponding loss to another participant's account. However, where an overpayment from one participant's account does result in a loss to another participant's account, the anti-forfeiture rules mandate that the lost funds be promptly restored to the other participant's account, regardless of whether the plan is able to recover the overpayment from its recipient or any other party.

- No complete prohibition on recovering interest or lost plan earnings on overpayments, where the plan, and not the participant, bears responsibility for the overpayment,

- No requirement that recovery cease once the full amount of the overpayment has been recovered,

- No ability for the responsible plan fiduciary to exercise its fiduciary discretion as to whether and how much to recover,

- No ability to return rolled-over overpayments without adverse tax consequences, and

- No requirement to permit participants to contest recovery efforts pursuant to the plan's claims and appeals procedures.

Innocent participants who have relied on a plan's benefit calculations in planning their retirement on the assumption that those calculations were correct have done nothing wrong—and, as a matter of fundamental fairness, should be afforded these protections as soon as humanly possible.

Legislation that would accomplish this critical goal is currently pending in Congress[4] and has received strong support in both the House and Senate, from both political parties, and from representatives of retirees, plan fiduciaries, and employers. We respectfully urge the IRS and Treasury to join us in supporting this legislation as the fastest and most certain way to provide the protections long overdue to innocent recipients of benefit overpayments, while at the same time protecting the retirement security of all plan participants.

* * *

[4] *See* H.R. 2954, **Securing a Strong Retirement Act of 2020**, § 301, and S.1770, **Retirement Security & Savings Act**, § 322.

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We stand willing to discuss this comment. If you have any questions, or if we can be of further assistance, please do not hesitate to contact us.

Respectfully submitted,

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Ms. Emily M. Lesniak
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Attn: CC:PA:LPD:PR (Notice 2021-28) Room 5203
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Via Federal eRulemaking Portal

RE: Notice 2021-28, Recommendations on Agenda Items for the 2021-2022 Priority Guidance Plan

Dear Ms. Lesniak:

The Pension Rights Center (PRC) is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers, retirees, and their families. We appreciate the opportunity to provide input and recommendations on the agency's guidance agenda for the coming year, input that reflects not only the expertise of our staff and advisors, but also decades of experience hearing directly and indirectly from participants and beneficiaries. In 2020, PRC received and responded to more than 2,000 calls for help from individuals with retirement problems. Moreover, since 1993, the Center has provided training and technical assistance to the U.S. Administration on Aging's Pension Counseling and Information Program, a network of Pension Counseling Projects[1] that provide free legal assistance to individuals who experience problems with their retirement plan. Those Projects are on the frontlines, and they serve as an invaluable source of information for PRC on the real-life experiences of participants and beneficiaries.

Meaningful Requirements for Disclosures and Consents

Both the tax and labor provisions of ERISA require retirement plans to furnish certain disclosures and to obtain certain consents because they play a critical role in enabling participants and beneficiaries to plan for retirement, watchdog plans, and enforce their rights to retirement benefits. These notices and disclosures also often play an instrumental role in helping to mitigate the problem of missing participants and beneficiaries, a problem that is receiving increasing attention from policymakers. Treasury/IRS currently has several agenda items pending that address the means by which disclosures and consents are delivered. PRC urges Treasury/IRS to the take the actions below to address those disclosure-related issues.

1. Fix Guidance on Deferred Vested Individual Statements

According to the Fall 2020 Unified Regulatory Agenda, Treasury/IRS is scheduled to release both a final rule and a proposed rule next month relating to benefit notices for plan participants who have a vested right to benefits but who have separated from the employer prior to retirement (deferred

[1] *See* "Counseling Projects," at http://www.pensionrights.org/find-help. Since their inception, the Pension Counseling Projects have served over 64,000 individuals and have recovered more than $268 million for their clients.

vested participants). The final rule was supposed to focus on Form 8955 reports for plans regarding deferred vested participants[2] and the proposed rule was supposed to focus on deferred vested individual statements.[3] PRC urges Treasury/IRS to hold off and review whatever was planned for both items, and instead to issue guidance that expressly protects the right of deferred vested participants to receive one, complete, unified individual statement, on paper, within a reasonable time following separation from the employer.

In particular, Treasury/IRS should revise FAQ #20 of its FAQs Regarding Form 8955-SSA[4] so that the FAQ conforms to the Code and the Form serves the purpose for which it was intended. The final rule scheduled for next month is based on comments the agency received in 2012. Around that same time, Treasury/IRS issued an FAQ regarding Question 8, stating that plans need *not* provide a separate benefits statement to deferred vested participants, but instead could satisfy the legal requirement and answer Question 8 on the form in the affirmative by providing the information in a piecemeal fashion[5] – using other disclosures such as individual benefits statements, summary plan descriptions, memoranda and quarterly statements to convey separate elements of the required information. PRC and other participant advocacy organizations strongly objected to the FAQ in writing[6] and in meetings with Treasury/IRS. However, the FAQ has remained on the books for the last decade.

Participants need a single statement that clearly states the benefits they earned, that they can present years later to prove their entitlement to benefits, and to show they did not receive their benefits while employed or upon leaving. A regular, periodic benefit statement received while employed will not show whether they were paid their benefits at the time of separation. Such regular statements can be, and often are, challenged by employers (or successors to the employer) many years later – employers who may not be the original employer for whom the participant worked. A *single, unified, plain-language, paper statement* of workers' rights to deferred benefits and the nature, amount, and form of those benefits, received within a reasonable period after separation from employment,[7] is crucial for participants and beneficiaries to establish their rights to payment of their benefits later at retirement or upon the death of the participant.

The clear language of Internal Revenue Code (IRC) section 6057(e) requires "an individual statement" (note the singular form) showing the nature, amount and form of the deferred vested benefit to which a separated participant is entitled, including the information required by IRC section 6057(a)(2). Beyond the clear language of the IRC, the penalties section of the Instructions

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[2] Treasury/IRS, Reporting and Notice Requirements for Deferred Vested Benefits under Section 6057, *Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions, at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=1545-BI40.

[3] Treasury/IRS, Reporting and Notice Requirements for Deferred Vested Benefits under Section 6057, *Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions, at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=1545-BM21.

[4] IRS, *FAQs Regarding Form 8955-SSA - What are the requirements for answering "yes" to question 8 on Form 8955-SSA?* https://www.irs.gov/retirement-plans/faqs-regarding-form-8955-ssa-what-are-the-requirements-for-answering-yes-to-question-8-on-form-8955-ssa (Page Last Reviewed or Updated: 02-Apr-2021).

[5] *See id.*

[6] *See e.g.*, Letter from Pension Rights Center to IRS, Re: REG-153627-08, Reporting and Notice Requirements for Deferred Vested Benefits Under Section 6057 (Sept. 24, 2012), *at* http://www.pensionrights.org/sites/default/files/docs/120924_pension_rights_center_deferred_vested_comments.pdf.

[7] If the IRS issues a new NPRM on individual statements as planned, it should be written to provide strong protections for deferred vested participants and beneficiaries as discussed above, including a requirement that the statement be provided on paper, in addition to any electronic versions sent by the plan.

for Form 8955-SSA clearly states that the "Code provides that each plan administrator required to file a registration statement must … also furnish to each affected participant *an individual statement* setting forth the information required to be contained in the form."[8] The FAQ on Question 8 of the 8955-SSA should be revised instead to state that plans must answer "no" if they provide anything other than the single, complete statement required by law.

2. Increase Consumer Protections Applicable to Electronic Delivery

Last year's Priority Guidance Plan included "regulations updating electronic delivery rules for providing applicable notices and making participant elections"[9] on the retirement benefits agenda. Although it is not apparent what the agencies had in mind in the way of updates, PRC has been clear about its position that strong consumer protections related to important ERISA disclosures for participants and beneficiaries are critical to the statutory scheme governing retirement plans. We are extremely concerned about the ratcheting down of those protections represented by the Department of Labor's recent "Notice-and-Access" regulations[10] and industry's continual lobbying of Treasury/IRS to eliminate any meaningful safeguards for disclosures within its jurisdiction.[11]

If Treasury/IRS *is* contemplating an update, PRC urges the agency to reevaluate and revisit its prior regulations allowing electronic defaults for the delivery of important retirement disclosures. The pandemic has shown us that being able to conduct business electronically is a necessary part of conducting important transactions, but it has also shown us that there remain significant disparities in access to computers and internet service and use. Significant portions of the population, especially Black (17%) and Hispanic (25%) householders, are dependent on smartphones and their cellular service plans for access to the internet,[12] yet smartphones are wholly unsuitable devices for reading, saving, and printing complex financial documents and should not be considered "effective access" for any important disclosure purpose. Before the pandemic, in 2018, about one-third of older householders age 65+ (for whom retirement plan disclosures are most timely and salient) did not own a home desktop or laptop,[13] and an estimated 15 million *retirement plan participants* age 55 and older did not regularly use the internet for email, shopping, or other purposes.[14]

But, beyond the statistics regarding the digital divide, the issue here is not whether electronic disclosure should be available, but rather whether it should be the *default* method of furnishing retirement plan disclosures – whether participants and beneficiaries should be required to opt out in order to receive important documents on paper, or whether they should receive them on paper unless they opt in to electronic delivery. According to the principles of behavioral economics, status

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[8] IRS, *2020 Instructions for Form 8955-SSA*, at 4 (2020), *available at* https://www.irs.gov/pub/irs-pdf/i8955ssa.pdf.
[9] Dept. of the Treasury, *2020-2021 Priority Guidance Plan: Initial*, #5 at 12 (Sept. 30, 2020) (emphasis added), *available at* https://www.irs.gov/pub/irs-utl/2020-2021_pgp_initial.pdf.
[10] Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA, 85 Fed. Reg. 31884 (May 27, 2020) (to be codified at 29 C.F.R. § 2520.104b–31) [hereinafter *Notice-and-Access Rule*].
[11] *See e.g.*, Letter from Tim Rouse, SPARK Institute, to Carol Weiser, U.S. Dept. of the Treasury, & Rachel Leiser Levy, IRS (Dec. 9, 2020), *available at* https://www.sparkinstitute.org/wp-content/uploads/2020/12/E-Delivery-Letter-from-SPARK-12.9.20.pdf.
[12] Pew Research Center, *Mobile Fact Sheet*, Chart: Who Is Smartphone Dependent, *at* https://www.pewresearch.org/internet/fact-sheet/mobile/.
[13] M. Martin, *Computer and Internet Use in the United States: 2018*, Table 1 at 5 (U.S. Census Bureau, Apr. 2021), *available at* https://www.census.gov/content/dam/Census/library/publications/2021/acs/acs-49.pdf.
[14] *See* A. Munnell, "This one change could undermine the retirement security of millions of Americans," *MarketWatch,* (July 14, 2020), *at* https://www.marketwatch.com/story/new-labor-department-rule-changes-default-retirement-plan-disclosure-from-paper-to-electronic-2020-06-29.

quo bias and inertia steer people to "select" whatever option is the default, especially if opting out to make a different choice is difficult or cumbersome.[15] Defaults can be set to ensure that inertia produces the most desirable result, as is the case with auto-enrollment and auto-escalation in retirement savings plans – defaults that *promote* retirement security.[16] Or, defaults can be set to produce a result that is harmful to the individual but profitable for a private company, as is the case with trial subscriptions that auto-renew and make it time-consuming and difficult to cancel.[17]

Defaults on retirement disclosures should be set so that doing nothing ensures actual *receipt* of the disclosure. In the case of "notice-and-access" defaults of the sort recently promulgated by the Labor Department,[18] however, the default is doubly cumbersome: that new rule makes it unnecessarily difficult to opt out in favor of receiving paper, *and* makes it exceedingly difficult to locate, access, and preserve the digital disclosures. Inertia will predictably lead to much higher levels of consumers receiving *no* disclosures, a result that is not only inconsistent with the clear statutory language and intent, but will have the effect of *diminishing* retirement security.

At a minimum, any update of the Treasury/IRS regulations on electronic disclosure should aim to *substantially strengthen* participant protections, for instance with tougher requirements for effective access and requirements that plans both confirm actual receipt of disclosures and indefinitely retain records of all disclosures. In addition, certain documents should be required to be provided on paper and sent by mail by default (even if also provided electronically), such as those requiring action by a participant or beneficiary, those with information on rights to benefits and protections for spouses and alternate payees, and any personalized documents such as individual statements for deferred vested participants.

3. Improve Spousal Protections

When Treasury/IRS last considered the issue of using electronic means for making benefit elections and consents, including spousal consents waiving a spouse's rights to survivor benefits and account balances, the agency permitted some aspects of the notarization process to be conducted electronically (e.g., electronic signatures). However, it retained the requirement that spousal consents be witnessed in the *physical presence* of the notary, because it recognized the potential conflict of interest that exists between spouses on spousal rights to retirement assets,[19] and the physical presence requirement helps to prevent fraud and coercion in the execution of spousal consents.

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[15] *See generally*, R. Thaler & C. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008) ("First, never underestimate the power of inertia. Second, that power can be harnessed." *Nudge* at 8.)

[16] "The dramatic change in participation illustrates the power of inertia – and with respect to savings, the crucial role of choice architecture." *Id.*, at 117.

[17] *See* L. Albrecht, "How behavioral economics is being used against you," *Marketwatch* (June 17, 2018), *available at* https://www.marketwatch.com/story/nobel-prize-winning-economist-richard-thalers-nudge-theory-has-a-dark-side-too-2017-10-17.

[18] *Notice-and-Access Rule*, *supra* n. 10.

[19] "But a reduced pension for the participant is not the only conflict of interest with a spouse. For instance, spouses may disagree over how to manage and spend retirement assets, or the participant spouse may wish to deprive the spouse of the benefit of the pension for malevolent reasons." Comment Letter of National Women's Law Center re: Proposed Regulations Concerning the Use of Electronic Technologies for Providing Employee Benefit Notices and Transmitting Employee Benefit Elections and Consents, 5, n. 27 (Oct. 12, 2005), *available at* https://nwlc.org/resources/letter-internal-revenue-service-re-comments-proposed-regulations-concerning-use-electronic-technologies-providing-employee-benefit-notices-and-transmitting-employee-benefit-elections/.

The lockdowns of businesses and social distancing requirements necessitated by the COVID pandemic meant that visiting a notary was neither prudent nor possible for most of 2020. In response, Treasury/IRS temporarily waived the need for spouses to sign consents in the physical presence of a notary and instead allowed remote notarization of consents using videoconferencing technology.[20]

Reports of economic coercion and domestic violence have surged during the lockdown.[21] Although the pandemic isn't yet over, a significant proportion of the population has been vaccinated, businesses are reopening, and individuals can again readily access notaries in person. Thus, while the rationale for the temporary waiver has largely disappeared, the rationale for keeping the physical presence requirement has only grown stronger. Forged IDs may be more difficult to detect by video than in person. Also, with in-person witnessing, the notary (or plan administrator) can see whether there is anyone with or near the spouse-signer. With video, however, even if the spouse appears to be alone signing the consent form, the notary would not know if a psychologically or physically abusive spouse-participant is standing outside the frame of the camera, or right outside a door listening and watching.

Still, PRC keeps hearing and seeing reports[22] that various segments of industry are leaning hard on Treasury/IRS to permanently eliminate the physical presence requirement for notarizing spousal consents. Yet, these industry proponents have not offered any legal or policy rationale that could justify such a drastic weakening of spousal protections. PRC strenuously opposes any significant changes without a full vetting of the reasons and the ability of all stakeholders, not just those with a financial interest, to voice their concerns. For this reason, if Treasury/IRS is considering any action other than letting the temporary waiver naturally expire within the next 3 months, it should first issue a Request for Information prior to proposing any changes, and it should also solicit ideas for strengthening the current protections.

Strengthen Efforts to Address Missing Participants

4. Reinstate the Letter Forwarding Program

The IRS should reinstate its letter forwarding program for qualified retirement plans, which was used by plan sponsors who could not locate missing participants in order to advise them of their rights to claim the benefits that they had earned. The IRS discontinued the letter forwarding program for plan sponsors in 2012, citing the availability of commercial locator services and internet

[20] IRS, *Temporary Relief from the Physical Presence Requirement for Spousal Consents Under Qualified Retirement Plans*, Notice 2020-42 (June 3, 2020), *at* https://www.irs.gov/pub/irs-drop/n-20-42.pdf.

[21] *See* A. Piquero, A. Jennings et al., "Domestic violence during the COVID-19 pandemic - Evidence from a systematic review and meta-analysis," 74 J. CRIM JUSTICE, art. 101806 (May-June 2021), *available at* https://www.sciencedirect.com/science/article/pii/S004723522100026X?via%3Dihub; K. Demasters, "Pandemic Stress Seen As Driver Of Financial Abuse," *Financial Advisor News* (Oct. 19, 2020), *available at* https://www.fa-mag.com/news/domestic-violence-usually-involves-financial-abuse--the-urban-resource-institute-says-58514.html.

[22] *See e.g.*, IRS, *Extension of Temporary Relief from the Physical Presence Requirement for Spousal Consents Under Qualified Retirement Plans*, Notice 2021-3, at 5 (Dec. 22, 2020) ("The Treasury Department and the IRS have received requests from stakeholders to make the relief provided in Notice 2020-42 permanent…."), *at* https://www.irs.gov/pub/irs-drop/n-21-03.pdf; Letters to IRS from Notarize (Feb. 5, 2021) and DocuSign (May 13, 2021), *at* "IRS Notice: Public Comments on Retirement Plan Participants Signing Elections Remotely (IRC §401)," *Bloomberg Law* (May 17, 2021), *available at* https://news.bloomberglaw.com/employee-benefits/irs-notice-public-comments-on-retirement-plan-participants-signing-elections-remotely-irc-401.

searches.[23] However, the problem of missing participants who cannot be located does not appear to have improved since 2012.

In a 2018 report, GAO recommended that the IRS should once again permit retirement plans to use the letter forwarding program in a "cost-effective" manner to help plan sponsors who are searching for missing participants.[24] Because, according to the report, participants and beneficiaries will likely open a letter from the IRS, the program is effective in reaching participants and beneficiaries who otherwise were not located by their plans. The IRS used to charge a user fee to plan sponsors who forwarded 50 or more letters, a fee that had not changed since 1994. Even so, some plan sponsors would send only 49 letters to avoid paying the fee.[25] (Fees for commercial locator services vary widely, and GAO stated that the PBGC estimates the cost for searches at $40 per participant.) PRC agrees with GAO that this program benefitted participants as well as sponsors, and agrees that "expanding the letter forwarding program would be beneficial, and we encourage IRS to consider cost-effective ways to do so."[26]

5. Revise Treasury Regulations on Forfeiture

Current Treasury Regulations[27] permit the benefits of missing participants to be forfeited. Although plans must pay "forfeited" benefits if participants and beneficiaries come forward, particularly in the case of mergers and acquisitions, they often do not know how to locate their former employers. In addition, plans may terminate before the benefits are claimed.

The PBGC has long had a Missing Participants program, which was expanded in 2017 to cover more types of plans and situations, including defined contribution accounts for missing participants.[28] Earlier this year, the Department of Labor issued guidance[29] temporarily permitting plans to use that program under certain circumstances without violating their fiduciary duty to safeguard the funds. The PBGC is increasingly recognized as the most logical focal point for transferring and preserving the balances and benefits of missing participants and beneficiaries. Accordingly, Treasury/IRS should replace current forfeiture regulations with requirements that plans transfer the funds of all missing participants, both past and future, to the PBGC Missing Participant program. At a minimum, plans should be required to undertake much more significant and effective efforts to locate missing participants and beneficiaries, including reinstating the letter forwarding program as discussed above.

Protect Participant Rights Through Clarification of Existing Law

6. Restore Guidance Prohibiting Lump Sum Cash-Outs to Retirees in Plan Deriskings

Derisking will again be attractive to plan sponsors if and when interest rates increase. In the majority of cases, people who take lump sum options are making suboptimal choices. The law is unclear on

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[23] Rev. Proc. 2012-35 (eff. Aug. 31, 2012), *available at* https://www.irs.gov/pub/irs-drop/rp-12-35.pdf.
[24] GAO, *Workplace Retirement Accounts: Better Guidance and Information Could Help Plan Participants at Home and Abroad Manage Their Retirement Savings*, at 27-29, (Jan. 2018), *available at* https://www.gao.gov/assets/gao-18-19.pdf.
[25] *Id.*, at 29, n. 78.
[26] *Id.*, at 56.
[27] 26 C.F.R. §§ 1.411a-4b6 and 1.401a-14d.
[28] 29 C.F.R. §§ 4050.201-207.
[29] DOL, Temporary Enforcement Policy Regarding the Participation of Terminating Defined Contribution Plans in the PBGC Missing Participants Program, FAB 2021-01 (Jan. 12, 2021).

whether a person in pay status can be offered a lump sum benefit commutation. The Treasury Department should restore its prior position, reversed by the Trump administration, that the IRS will not issue advance rulings on whether offering such payments are consistent with tax qualification requirements.[30] We also encourage the Department to undertake a study of derisking when liabilities are transferred to an insurer – in particular, whether all ERISA rights and conditions are being preserved following a transfer. Such rights include, for example, a restraint on alienation and protection against creditors; a restriction on a subsequent transfer of liabilities to another insurer; and appropriate restraints on the insurer's ability to offer a later lump sum commutation of remaining benefits. Since the relevant considerations involve the role of fiduciary standards in selecting an insurer, we would urge that such a study be undertaken in consultation with the Department of Labor, in connection with a request for information from the public.

7. Definition of Church Plans

The Supreme Court, in *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), reserved a decision about whether a plan's administrative committee is a so-called (C)(i) organization, that is, "an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits . . . for the employees of a church or a convention of churches, if such organization is controlled by or associated with a church or a convention or association of churches."[31] The legislative history makes plain that Congress intended that the organization be a church pension board and the language of the statute is consistent with this. This question should be part of the regulatory agenda and we note that the Department previously indicated that it would issue a notice of proposed rulemaking.[32] In addition, the Department should consider whether a plan that has a continuous history of filing as an ERISA plan should either be estopped from changing its status or be considered to have made a constructive election of church plan status.

Conclusion

There is much that Treasury/IRS can and should do to issue guidance that safeguards important rights for workers and retirees. The Pension Rights Center appreciates this opportunity to provide input on the agency's Priority Guidance Agenda and looks forward to providing more specific recommendations in particular proceedings.

Sincerely,

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	Professor, Thomas R. Kline School of Law, Drexel University

[30] IRS, Use of Lump Sum Payments to Replace Lifetime Income Being Received By Retirees Under Defined Benefit Pension Plans , Notice 2015-49, *at* https://www.irs.gov/pub/irs-drop/n-15-49.pdf.
[31] 29 U.S.C. 1002(33)(C)(i); IRC sec. 414(e)(3)(A).
[32] Treasury/IRS, *Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions, at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=1545-BO31.

Congress gets closer to addressing the issue of lost retirement plans

July 16, 2021

Here at PRC, we often hear from people who worked for a company that has since moved, been bought, or gone out of business, and they cannot find their retirement plan. The good news is that Congress seems to be getting closer to addressing this issue. In May of 2021, Senators Elizabeth Warren (D-MA) and Steve Daines (R-MT) re-introduced the Retirement Savings Lost and Found Act (S.1730).

In his recent column, ***The Savings Game: Congress can make it easier to find lost retirement funds***, Elliot Raphaelson explains some of the key provisions of the bill. First, it would establish an online pension registry inside a new Office of Lost and Found housed in the Pension Benefit Guaranty Corporation (PBGC). If a retirement plan changed its name or address or was sold, they would be required to forward this information to the database. This would help individuals search for pension and 401(k) plans that are "lost" when their former companies move or change corporate structures.

Addressing this issue has long been a priority of the Pension Rights Center. As Karen Ferguson, PRC President, says in the column, "this will help retirees locate the pension and other retirement benefits they earned but cannot find because their former employers changed their names, addresses or structure. Currently, thousands of individuals contact pension counseling projects and government agencies each year seeking help in finding their lost pensions. This important bill will close a critical and too-long-overlooked gap in our nation's private retirement system."

The bill also addresses the issue of "forced transfers," where plan administrators may transfer small accounts of former employees out of the retirement plan, if such a transfer is permitted by the plan rules. The Retirement Savings Lost and Found Act would require plans which force out small accounts of $1,000 or less to send the account balance to the Office of Retirement Saving Lost and Found if they cannot locate the participant. Then, individuals would be able to go to the database to find their lost money. As Raphaelson explains, "the bill requires reporting to the PBGC for unclaimed forced-out accounts in excess of $1,000, but less than $6,000 that are transferred to an IRA. Individuals with small forced-out accounts will be able to search the database to find contact information for the financial institution holding their IRA. The bill raises the force-out limit from $5,000 to $6,000."

These lost plan provisions have also been included in the Securing a Strong Retirement Act of 2021 (H.R.2954), which was passed unanimously out of the Ways & Means Committee in the House of Representatives on May 5, 2021, and in the Retirement Security and Savings Act (S.1770), introduced in the Senate on May 20, 2021.

We are hopeful that Congress will act to pass these provisions, as they will help many retirees across the country who are struggling to locate the retirement benefits they worked for and earned.

If you are looking for an old retirement plan and need help, see if you are covered by **one of the pension counseling projects**, or **reach out to us**.

The Labor Department's new disclosure rule: What could it mean for you?

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Friday, July 24, 2020

The Labor Department issued a new rule, effective July 27, 2020, that describes a new form of electronic disclosure for retirement plan information called "notice-and-access." This new scheme of disclosure will put the burden of finding retirement plan information on to the participants in the plan. Rather than receiving your retirement plan information on paper through the mail, you could be required to search websites to find that same information. If your employer has chosen to use this "notice-and-access" disclosure scheme you will need to be proactive in seeking out the information you want that, in the past, would have been sent to you by mail.

It is important to know that employers are not required to use this notice-and-access delivery method. It is an optional delivery method. However, it is expected that most employers will decide to use it.

How does "Notice-and-Access" work?

Electronic communication

- All communications from the plan to you will be electronic, either email or text. Only written communication is permitted by the rule, no voice messages. You will have rights to request paper copies and to opt-out of electronic disclosure as discussed below.
- You must have an electronic address, either an email address or smartphone number that can receive text messages. This is how the plan will communicate with you. If you do not have an electronic address and you are an employee, your employer can assign an address to you.

Initial paper notice

- You will receive an initial notice on paper that you have the right to opt-out of electronic delivery completely. The paper notice must tell you how to request an opt-out. The initial paper notice can be part of a package of information given to you and does not have to be delivered separately. The notice must include the electronic address that the plan will use for you, instructions on how to access documents including passwords, whether you must download a mobile application, or open an online account. The notice must include a statement that documents will only be on the website for a year or until replaced by a newer version of the same document, whichever is later.

Notice of internet availability (NOIA)

- After the initial paper notice, all notices of website postings of documents will be delivered electronically to your electronic address. When disclosures are posted on the website a "notice of availability" (NOIA) must be sent to your electronic address. This is either an email or text message. The notice could include a link to the website, but that is not required. The notice must tell you that you have important information about your pension plan on the website and give the name or a brief description of the document posted on the website. One notice can include several different documents when they are posted at the same time on the website, such as annual notices. However, each document posted should be described separately in the notice. *Quarterly benefit statements for 401(k) plans cannot be combined with other disclosed documents.* IMPORTANT: *The notice of internet availability must include your right to free paper copies of each document and how to exercise that right. The notice must also include your right to totally opt-out of electronic delivery and how to do it. The notice must include a contact phone number.* Be aware that only one paper copy of a document must be provided for free. There could be a charge for additional copies. When a notice includes more than one document, you may choose which of the documents you would like on paper, or all of them.

Website

- It will be up to you to find and search the named website for the retirement plan information in the notice. The website must provide "ready access" to the document. The retirement plan information presented on the website must be in a form that can both be saved to an electronic folder and printed. As mentioned earlier, *retirement documents must remain on the website at least for a year or until replaced by a newer version of the same document, whichever is later.* The plan administrator or employer is responsible for maintaining the website and ensuring compliance by service providers, such as financial firms.

Leaving employment

- If you leave employment or retire your employer can continue to use this notice-and-access system to send retirement information to you. This could be problematic if you change email addresses. It will be up to you to stay in touch with your employer since there is no requirement for the plan to regularly monitor whether you are receiving or viewing the emails or texts. If the plan receives a "bounce-back" from an email then the plan must seek to correct the email address. Without a correct email address, the plan must send paper copies by mail.

Permitted variations

- The new rule does permit some variations to a strict notice-and-access system of delivery.

  Employers may choose to send you an email with documents attached. The documents must be printable, and the email notice must include the right to paper copies and the right to opt-out of electronic delivery. This "direct delivery" electronic disclosure method can be combined with notice-and-access. Alternatively, employers may choose, but are not required, to send some documents to you on paper by mail.

Know your rights and obligations

Your right to paper copies and the right to opt-out could be the most important rights in this "notice-and-access" scheme. You will be responsible for obtaining the documents you will need to understand your plan and to later prove your right to benefits when you leave employment. Some brief documents can perhaps be read and understood on a website, but others may require study, such as the comparative chart of investment choices, while others should be held for future reference, such as summary plan descriptions and benefit statements. You will need to be pro-active in requesting paper copies. Be aware that the rule requires only one FREE paper copy per document. Once you get a paper copy, you need to keep it.

Remember that documents may only be posted on the website for a year, or if later, until the document is replaced by a newer version of the same document. For example, a quarterly pension benefit statement could be replaced every year. An SPD could be on the website until it is replaced by a newer version. **However, you should request paper copies of important documents as soon as possible so that you will have them for your records.** Be sure when requesting paper copies that you follow the instructions and if you do not receive a copy "promptly" you should follow-up.

You can opt out of electronic disclosure at any time.

Other Items to know

Spouses and beneficiaries are only included in this "notice-and-access" disclosure system if they have voluntarily provided an electronic address.

If you choose to opt-out of electronic disclosure, you will of course receive all disclosures by mail. Employers may, however, give you a choice of which disclosures you want on paper and which you would like to receive electronically on the website, but this is not required.

Problem solving

If you encounter difficulties in opting-out or receiving paper copies from a service provider when you have requested them, you can inform your employer of the problems you have had. Employers have an obligation to monitor service providers. Similarly, if the procedures to request paper or to opt-out are particularly cumbersome, you should inform your employer.

You also can submit a complaint to the Employee Benefits Security Administration of the Department of Labor by calling 1-866-444-3272 or by sending an e mail to them at **webmaster.ebsa@dol.gov**.
If you continue to have problems receiving requested documents, you may contact one of the U.S. Administration on Aging's **Pension and Information Counseling Projects.**

Resources

For more detailed information about the Labor Department notice-and-access rule for delivery of retirement plan information, see the Pension Rights Center Fact Sheet, **“Labor Department Notice-and Access Disclosure Rule: BASICS.”**

The Pension Rights Center has **a list and brief description** of many of the required documents that could be disclosed to you. Of course, you will not receive all of the documents listed, only those that pertain to your plan. You could find the list helpful.

See also:

Pension Rights Center, **“The Top 10 Worst Things About the Department of Labor’s New “Notice-and-Access” Rule for Retirement Plans.”**

AARP.org: **New rule for retirement plans hinders access to paper statements**

MarketWatch: **This one change could undermine the retirement security of millions of Americans**

The Labor Department's Notice-and-Access Disclosure Rule: The Basics

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The Labor Department has issued **a new rule** for electronic delivery of plan disclosures to retirement plan participants, called "notice-and-access."[1] The rule is effective July 27, 2020.[2] The new rule replaces prior guidance on electronic delivery of disclosures to participants, with the exception of a 2002 electronic disclosure rule.[3] The 2002 electronic disclosure rule remains in effect and permits electronic disclosure to employees who work with the employer's computer system as part of their daily duties and to those participants and beneficiaries who choose to receive disclosures electronically.

Although the notice-and-access rule is effective July 27, 2020, the Labor Department included an 18-month transition period for plans to adjust their procedures to comply with the new rule.

Employers still may send disclosures by paper or follow the 2002 electronic disclosure rule. However, it is expected that many employers will choose this new method for furnishing disclosures to participants.

How Notice-and-Access Works

In brief

Plan participants are notified by electronic means, either email or smartphone text, that a document is available for viewing on a website. Participants must then go to that website and find the named document to view the disclosure. Thus, rather than automatically being sent paper copies of disclosures in the mail, workers and retirees will now receive an electronic communication that they must go and find the disclosure on a website. The email or text must tell them that they can request a free paper copy, which should be provided "promptly."

In more detail

Covered individuals and covered documents

- *Individual participants must have an electronic address, either an e-mail address or a smartphone number.*[4] Participants can voluntarily provide an electronic address to their employer or an address can be assigned by an employer for an employee only for employment-related purposes. Commercial locator services cannot be used to obtain an electronic address for an individual. For this notice-and-access rule, all communication must be in writing; voice calls, voice messaging, and robocalls cannot be used. *Spouses and other beneficiaries are included in this delivery method only if they have voluntarily provided an electronic address.*

- *All ERISA Title 1 disclosures that are required to be furnished to participants can be sent using this disclosure method with the exception of documents available only by request.*[5] Summary plan descriptions (SPDs), individual benefit statements, investment information and choices, fee disclosures, and notices about black-out periods and suspension of benefits are just some of the disclosures that can be sent using notice-and-access.[6]

Notices

Initial Notice[7]

- *Participants included in the notice-and-access delivery method will receive an* ***initial notice on paper*** *of the right to opt-out of all electronic delivery and how to exercise that right.* The notice must include the right to request free paper copies of individual documents and how to exercise that right. However, there is no requirement that the initial paper notice be distributed in a conspicuous way; for instance, it could be part of a larger, new-employee package provided at the beginning of employment and could be overlooked.

  The initial paper notice must also include a statement of the specific electronic address that the plan will use to send the notices to the participant, plus any instructions for steps that will be necessary to access documents, such as creating passwords, downloading a mobile application or setting up an online account. A contact phone number is not required in the initial notice.

Notice of Internet Availability (NOIA)[8]

- *When a document is posted on a website, participants will be sent a* ***"notice of internet availability"*** *(NOIA) to their electronic addresses advising them that the disclosure has been posted. A hyperlink to the document is not required.* The NOIA must describe how to access the website to search for the document that is posted. *The NOIA must also include a statement that says "Important information about your retirement plan is available," the title of the document posted or a brief description of the document, the right to request and obtain a free paper copy and how to do it, the right to opt out of electronic delivery and how to do it, and a telephone number for contacting the plan administrator or other plan representative. A toll-free telephone number is not required.* Additionally, the NOIA must include a statement that the document posted on the website may be available for only a year, or until the document is replaced by a newer version of the same document, whichever is later. (See website requirements discussed below.)

The NOIA may, but is not required to, include a statement saying whether any action is needed by the participant in response to the information provided in the posted document.

The plan administrator is not required to monitor delivery of the NOIA to ensure that the notice is opened and read, nor to ensure that a participant actually accessed the disclosure on the website. The only requirement is that the system be designed to alert the plan administrator when an email or text message has bounced back as undeliverable. If an electronic address is inoperable, the administrator must take reasonable steps to get a working electronic address. If the administrator cannot obtain a valid electronic address for a participant, the administrator must send paper copies of documents as if the individual had chosen to opt out of electronic delivery.

Notices that can be combined[9]

- ***Several disclosures can be combined*** *in one notice of internet availability.* The disclosures remain separate, but the notice can alert the recipient to more than one disclosure.

  Four categories of documents can be combined in one NOIA. These are:

  (1) The Summary Plan Description (SPD).

  (2) Required annual notices that do not require action, including the Summary Annual Report (SAR), annual funding notices, Qualified Default Investment Alternative (QDIA) notice, annual pension benefit statement (but not the 401(k) quarterly statements), annual investment-related information such as the investment chart, general plan information and descriptions of fees. (**Note:** Quarterly benefit statements for 401(k) plans cannot be combined with other documents. Each quarterly pension benefit statement must have a *separate* notice of internet availability.)

  (3) *Any other "covered document" if authorized in writing by the Secretary of Labor.*

  (4) *IRS notices if authorized in writing by the Treasury Secretary.*
  The notice of internet availability must include a statement of the right to free paper copies. *When disclosures are combined, individuals may choose which of the disclosures they want on paper.*

Rights to Paper[10]

- Plan administrators must furnish to individuals joining the plan an initial notice on paper of the right to opt-out of electronic delivery and the right to request paper copies of documents posted on the website. The initial notice must include how to exercise those rights, but the notice does not have to include a phone number and can be furnished along with other documents. (See above discussion of the initial paper notice.)

  Following the initial paper notice of the rights to paper, all other mentions of rights to paper will be delivered electronically as part of the notice of internet availability (NOIA). Plan administrators must have "reasonable procedures" for individuals choosing paper that do not “unduly inhibit” processing a request for paper. The NOIA must include a phone number for contacting the plan administrator or plan representative.

Only one paper copy of a document must be furnished free of charge. It is up to the plan whether to charge for additional copies. Additionally, individuals requesting to opt out of electronic delivery cannot be charged a fee.
Plans are not required to let individuals who opt out of electronic delivery pick and choose which documents they want on paper and which will be delivered electronically. A global opt-out is total. After a participant opts out, a plan *may permit* individuals to choose some paper and some electronic. It is up to the plan whether an individual can choose which disclosures to receive by paper. Also, plans may choose to give access to the website to individuals who opt out, but this is not required.[11]

Website Standard[12]

- The website can be an internet website or a “mobile application.” There are no specific security requirements (e.g., against hacking or fraud) beyond “reasonable” measures to ensure the website protects the confidentiality of personal information. Documents must be presented on the website in a manner that can be understood by an average participant. *Documents on the website must be presented in a format suitable for reading, saving to an electronic folder and for printing. Documents must remain on the website for one year or when replaced by a newer version of the same document, whichever is later.* Thus, a quarterly benefit statement, which is replaced each quarter, must remain on the website for a year. An SPD could remain on the website for several years until a newer SPD is issued.

The plan administrator is responsible for establishing and maintaining the website and for having “reasonable procedures” for compliance by service providers.

Direct Delivery[13]

- As an alternative to using notice and website access, a plan administrator may use a method of delivery that more closely resembles the more common understanding of “electronic disclosure.” Participants are sent an e-mail that includes the document disclosed as part of the e-mail or as an attachment. The e-mail message must include all of the information required for a notice of availability, including the right to paper. Also, the document must be in a format that can be easily read, printed on paper, and retained electronically. *Importantly, direct delivery can only be sent to an e-mail address and not to a smartphone number. This delivery method can only be used for participants with e-mail addresses.*

Leaving Employment[14]

- Plan administrators must take measures calculated to ensure the continued accuracy of the electronic address or obtain a new electronic address for participants leaving employment who received employer-assigned electronic addresses while at work. However, there is no requirement to verify electronic addresses for departing employees who voluntarily provided an electronic address to the employer. Plan administrators can continue to send plan information to former employees using the notice-and-access delivery system. Former employees will have the same rights to opt out of electronic delivery and rights to paper copies as they had when employed.

The Pension Rights Center submitted **comments** to the Labor Department on the proposed notice-and-access rule. In the comments we expressed our concerns that the rule will harm many participants who may fail to receive important plan information and who may not be able to retain the information they need to understand their rights to plan benefits and to later apply for those benefits.

See also The Pension Rights Center's

- Notice-and-Access Fact Sheet for Consumers, **"The Labor Department's New Disclosure Rule: What could it mean for you?"**

- The Top 10 Worst Things about the Department of Labor's New **"Notice-and- Access" Rule for Retirement Plans."**

AARP.org: **New rule for retirement plans hinders access to paper statements**

MarketWatch: **This one change could undermine the retirement security of millions of Americans**

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[1] Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, RIN 1210-AB90, 85 Fed. Reg. 31884 (Final Rule, May 27, 2020).
[2] See 29 CFR Sec. 2520.104b-31.
[3] Prior guidance includes Field Assistance Bulletin (FAB) 2006-03, FAB 2008-03, Technical Release 2011-03R (TR 2011-03R).
[4] See paragraph (b) of the rule for a definition of covered individuals.
[5] See paragraph (c) of the rule for a definition of covered documents. Documents available only by request include the complete plan document, collective bargaining agreement, and Form 5500 annual financial report.
[6] See Pension Rights Center **List of Required Disclosures**.
[7] See paragraph (g) of the rule for initial notice requirements.
[8] See paragraph (d) of the rule for information on the notice of internet availability.
[9] See paragraph (i) of the rule for information on combining notices.
[10] See paragraph (f) of the rule for a description of the right to paper copies.
[11] In the preamble to the rule, the Labor Department states "plan administrators may offer additional opt-out election options, such as a document-by-document opt-out or one based on categories or classifications of covered documents. For example, some participants might be comfortable knowing that certain documents, such as the SPD, are available on the website, but prefer to receive paper versions of other documents, such as their quarterly pension benefit statements." Also,"(O)nce a plan respects the individual's election (to opt out) and satisfies its obligation to furnish paper documents, the plan may continue to provide online access to covered documents that are available as well. The safe harbor has no effect on optional action in this context by plan administrators." 85 Fed. Reg. 31899, May 27, 2020.
[12] See paragraph (e) of the rule for a discussion of the website standard.
[13] See paragraph (k) of the rule for a description of direct delivery.
[14] See paragraph (h) for a discussion of severance from employment.