

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 groups² (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 IRS 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 1984⁵ 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 be 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

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 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

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

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 online¹⁴ – 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

¹⁴ Bill Analysis re: AB 199, California Online Notary Act of 2019, Assembly Comm. on Judiciary, 10 (Apr. 20, 2019), at https://leginfo.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 what is 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.

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 technology²³ 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

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 Commissioner³¹ 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.

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.

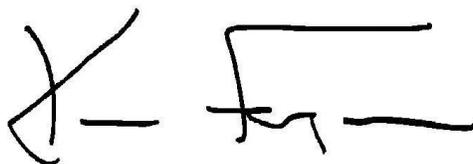
Nevertheless, in the unfortunate event that Treasury-IRS is inclined to consider weakening the law to allow remote witnessing, the agency must bolster protections well beyond those provided in the temporary guidance. It should apply those protections to both plan administrators and notaries, and it should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

Thank you for the opportunity to share our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Friedman". The signature is fluid and cursive, with the first name "Karen" being more legible than the last name "Friedman".

Karen D. Friedman
Executive Director

A handwritten signature in black ink, appearing to read "Karen W. Ferguson". The signature is more stylized and blocky than the one to its left, with a prominent horizontal line at the end.

Karen W. Ferguson
President