

Ms. Emily M. Lesniak
Office of the Associate Chief Counsel (Procedure and Administration)
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2021-28) Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

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 Projects¹ 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 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 participants² 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-SSA⁴ 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 fashion⁵ – 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 writing⁶ 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

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” regulations¹⁰ 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

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.

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 reports²² 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.famag.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 Regulations²⁷ 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 guidance²⁹ 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

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.

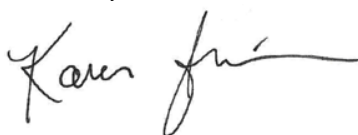
7. Definition of Church Plans

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,



Karen Friedman
Executive Director



Norman Stein
Senior Policy Advisor, Pension Rights Center
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>.