

Via Electronic Delivery

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Dear Ms. Weiser and Ms. Judson:

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

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

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

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

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<sup>1</sup> Letter from Karen Ferguson, Pension Rights Center, & Amy Matsui, National Women’s Law Center, to Carol Weiser, Treasury, & Victoria Judson, IRS (Apr. 14, 2020), *available at* [http://www.pensionrights.org/sites/default/files/docs/prc-nwlc\\_letter\\_on\\_emergency\\_spousal\\_consent\\_4-14-20\\_f.pdf](http://www.pensionrights.org/sites/default/files/docs/prc-nwlc_letter_on_emergency_spousal_consent_4-14-20_f.pdf).

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

<sup>3</sup> *Id.*, at 1 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,



Karen W. Ferguson  
Director  
Pension Rights Center



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

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<sup>9</sup> *Id.*