

May 2, 2022

Attn: Dharmesh Vashee
Office of General Counsel
Federal Retirement Thrift Investment Board
77 K Street NE, Suite 1000
Washington, DC 20002

Re: Transition to a New Recordkeeping System

Dear General Counsel Vashee:

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. The National Women’s Law Center (NWLC) has fought for gender justice and women’s economic security for more than 45 years — in the courts, in public policy, and in society — taking on the issues that are central to the lives of women and girls. The Women’s Institute for a Secure Retirement (WISER) is dedicated to improving the long-term financial security of all women through education and advocacy. In the 1980s, PRC and NWLC worked together to secure the enactment of several laws to protect spousal pension rights, including laws to ensure critically important retirement benefits for the widows and divorced spouses of federal employees. Since that time, all three of our organizations have continued to educate women about their spousal retirement rights and have actively engaged in policy debates to protect and improve those spousal rights. PRC, NWLC appreciate this opportunity to offer our comments on the Notice of Proposed Rulemaking¹ issued by the Federal Retirement Thrift Investment Board (Board) and the ways in which the Thrift Savings Plan’s (TSP) new recordkeeping system will impact the rights of participants and beneficiaries.

Introduction

The shared ownership of pensions and retirement savings account balances (and shared control over timing and form of payment) by both spouses in a marriage derives from the concept of marriage as an economic partnership: employers’ contributions to retirement benefits are a form of deferred compensation, earned and owned by both spouses. Moreover, the benefits will be used to provide income to both spouses in retirement, making joint decision-making about those benefits critically important. Spousal rights and benefits and lifetime survivor annuities are important to all non-employee spouses, but they are especially critical to women’s retirement security. That is because women generally earn less than men, perform more unpaid caregiving, have less retirement wealth² and tend to outlive men, making it more likely that they will rely on a spouse’s retirement benefits in retirement.

Default survivor annuities, and the requirement for written spousal consent to give them up and allow a different form of payment, are the linchpins of spousal retirement protections, both in and

¹ Transition to a New Recordkeeping System, 87 Fed. Reg. 11516 (Mar. 1, 2022), *available at* <https://www.govinfo.gov/content/pkg/FR-2022-03-01/pdf/2022-03478.pdf> [hereinafter *Proposed Rule*].

² *See generally*, Christian E. Weller, *et al.*, Nat’l Inst. on Retirement Security, *Still Shortchanged: An Update on Women’s Retirement Preparedness* (May 2020), *available at* <https://www.nirsonline.org/reports/stillshortchanged/>.

out of government. Although FERS and CSRS annuities provide foundational retirement income security that include spousal annuity protections, TSP accounts, especially for FERS participants, also constitute a significant portion of a couple's combined retirement wealth. The loss or diminishment of those funds by providing easy access to loans and withdrawals without adequate protections for spouses would be irreversible and potentially devastating to the spouse.

The requirement for spouses to provide their written consent to forms of payment other than a joint and survivor annuity, or to TSP loans and withdrawals, is *statutory*.³ As a prior statement by the Board points out, “[t]he participant cannot make any other type of withdrawal unless the participant’s spouse signs a written statement waiving his or her entitlement to a survivor annuity. This signed, written waiver (“spousal consent”) is a statutory requirement.”⁴ Although notarization of that written consent is not required by the statute, nearly two decades ago the Executive Director of the Board published a regulation requiring spousal consents to be notarized.⁵ This now-longstanding requirement was and still is a prudent, reasonable, and essential addition to the spousal rights regime applicable to TSP accounts.

It is one thing to outsource TSP recordkeeping functions to private vendors⁶ in order to better facilitate online transactions. It is quite another to obliterate the mechanisms by which statutory spousal rights are actually protected. We have comments on a couple of other issues, but our primary comment is on the issue of spousal consent.

We strongly oppose the Proposed Rule’s:

- 1) elimination of any notarization requirement for spousal consents;**
- 2) failure to impose any requirements or offer any explanation at all on how spousal consents will be provided, executed, and proven in this online system; and**
- 3) inadequate provisions about how the spousal consent requirement will be enforced, the penalties for violations, and the remedies that will be provided to defrauded spouses.**

³ 5 U.S.C. § 8435(a)(1)(b) and (e)(1)(a). The statute (5 U.S.C. § 8435) and Part 1650 of current and proposed regulations provide some exceptions to the spousal consent requirement. We do not urge changes in those exceptions or the documentation requirements to establish them.

⁴ Temporary Waiver of Notarization Requirement for Spousal Consent; Interim Rule 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> [hereinafter *Temporary Waiver*].

⁵ See Thrift Savings Plan—Employee Investments, Participant’s Choices, and Miscellaneous Amendments; Interim Rule, 68 Fed. Reg. 35492 (Jun. 13, 2003) [hereinafter *2003 Rule*], and Final Rule, 68 Fed. Reg. 74450 (Dec. 23, 2003).

⁶ The Proposed Rule refers only to “the recordkeeper,” but multiple vendors are involved. The Board awarded the contract to build a digital platform for TSP to Accenture Financial Services, but it is Alight Solutions, which “has a decades-long history of administering large, complex defined contribution plans,” that will apparently be “the recordkeeper.” Accenture will also deploy several other subcontractors. Accenture Federal Services Wins Federal Retirement Thrift Investment Board Contract to Improve Retirement Outcomes for Civil Service and Military 401K, News Release (Nov. 19, 2020), available at <https://newsroom.accenture.com/news/accenture-federal-services-wins-federal-retirement-thrift-investment-board-contract-to-improve-retirement-outcomes-for-civil-service-and-military-401k.htm> [hereinafter *Accenture News Release*].

Before the TSP goes live⁷ with this new recordkeeping system, the Proposed Rule needs major revisions – and, as such, the TSP’s recordkeeper should be required to make major corresponding operational changes in order to strengthen spousal protections.

I. The Proposed Rule Effectively Vitiates the Statutory Requirement for Spousal Consent and Will Irreversibly Jeopardize Spousal Rights

A. Elimination of the Notarization Requirement Is Arbitrary, Capricious, and Imprudent

One key reason why survivor benefits are provided automatically to spouses unless they sign a consent form in front of a notary is because there is a built-in conflict of interest between the spouses over the form and timing of retirement payments. Usually, the amount of the participant’s benefit is reduced to help finance a surviving spouse benefit. The participant collects more if the spouse collects less. In the case of retirement savings arrangements like the TSP, even loans and partial post-employment withdrawals diminish the amount in the account that is available for the joint and survivor annuity. In other words, participants have a financial incentive to cheat if they want to access funds only for their own benefit instead of sharing with their spouse. Requiring spousal consents to be in writing and signed by the spouse in the presence of a notary is a well-recognized and proven method that helps to prevent spousal waivers from being coerced or procured by fraud.

Under the TSP system, spousal consent is statutorily required before a participant can take withdrawals or loans or elect a form of payment that denies the spouse a 50% survivor annuity. Notarization of that consent is not required by the statute, but has been required for nearly two decades by regulation. In fact, it took a pandemic – with unprecedented business closures and stay-at-home directives – to spur the Board to temporarily suspend its notarization requirement for spousal consents.⁸ Even then, the suspension was short-lived. In reinstating the notarization requirement just five months later, the Board stated that the “protection of spousal rights is of the utmost importance to the FRTIB,” which is why “the FRTIB generally requires spousal consent to be notarized” even though notarization is not required by statute.⁹ The Board also observed in more specific terms the importance of requiring spousal consents to be notarized by a third party: “With electronic and remote options in place, we’re reinstating these notarization requirements *as an important security measure against attempts at fraud.*”¹⁰

Under the Administrative Procedures Act (APA) and binding Supreme Court precedent on agency regulation, one of the minimum requirements of rulemaking is that an agency gives a “reasoned explanation” justifying its proposed rule and assessing its impacts.¹¹ The agency “must examine the

⁷ TSP keeps putting out bulletins that the new system will be transitioning in May and be in place by June, 2022. This seems rather quick given that comments on the Proposed Rule aren’t due until May. Usually, it would take several months to review and consider comments, and then more time to issue a final rule. The Board should place on hold making any operational changes related to the provision and proof of spousal consents until it adequately addresses and fixes the flaws discussed in this comment letter.”

⁸ *Temporary Waiver*, *supra* n. 4.

⁹ Temporary Waiver of Notarization Requirement for Spousal Consent; Final Rule 85 Fed. Reg. 59173 (Sept. 21, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2020-09-21/pdf/2020-20789.pdf>.

¹⁰ TSP, “Notarization requirements reinstated as of October 1, 2020,” *Plan News* (Oct. 1, 2020), available at <https://www.tsp.gov/plan-news/notary-requirements-reinstated/> (emphasis added).

¹¹ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

relevant data and articulate a satisfactory explanation for its action,”¹² including by “paying attention to the advantages *and* the disadvantages of agency decisions.”¹³ The Board has failed to meet those minimum requirements here.

Fraud is a real concern in spousal waivers of retirement benefits. Over the years, the Pension Rights Center has indeed seen numerous examples of participants who lie about their marital status, saying they are single to avoid having to get spousal consent to a distribution or single-life annuity. Participants have also been known to forge their spouse’s signature on the consent form, or even have an imposter pose as the spouse to sign the consent form.¹⁴ Often, there may be a power imbalance between the spouses such that a spouse is told to sign and does so without understanding the import of what she or he is signing. In other cases, spouses may be the victims of emotional and/or physical abuse, and are coerced into signing the consent form. Requiring notarization is no guarantee that fraud or coercion will not occur, but at least it makes fraud and coercion more difficult to accomplish.

Yet, the Board is proposing to eliminate the notarization requirement for spousal consents – a requirement it recently called “an important security measure against attempts at fraud” – with no reasoned explanation or rationale. The sum total of the Board’s rationale is a half sentence that merely asserts that this can be done “because the new record keeper will, instead, use a variety of other identity verification methods.”¹⁵ This bare assertion is clearly inadequate to establish that these other methods provide any measure of protection against fraud or coercion, much less protection commensurate with notarization.

Nor has the agency assessed the likely impact of proposal and its potential disadvantages for spouses. The Proposed Rule makes no mention of coercion, and its *only* mention of fraud appears in the context of making it *optional* for the recordkeeper to freeze a participant’s account even in the face of known fraud or theft.¹⁶ How exactly will fraud and coercion – threats the agency has repeatedly conceded to be real in the past – be prevented under this new recordkeeping system? It is very troubling that the Proposed Rule does not articulate the need for or specify any standards that the recordkeeper must use to protect against fraud and coercion. It would appear that the Board has outsourced this function and responsibility, but without placing any requirements on the recordkeeper.

Eliminating the requirement that spousal consents be notarized also simply makes no sense in light of TSP’s apparent longstanding acceptance of electronic signatures and its recently acquired capability to accept remote online notarization (RON). Other than during the worst months of the pandemic, the Pension Rights Center and the National Women’s Law Center (and numerous other

¹² *Id.* (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹³ *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (emphasis in original).

¹⁴ See also Comment Letter of David Goldberg, Attorney-at-Law, Re: Transition to a New Recordkeeping System (May 1, 2022) (“In the real world where I live and work, it is all to [sic] common for Military Members and Federal Employees in particular to: (i) forge their spouse’s names waiving survivor annuity benefits; or, (ii) submit applications for retirement electronically and falsely represent themselves as being ‘unmarried’. . . . The same is true with respect to TSP forms submitted for the purpose of applying for withdrawals and loans. . . . I fear that any loosening of the Notary requirements will further facilitate the worst in people involved in contentious divorces.”).

¹⁵ *Proposed Rule*, *supra* n.1, at 11517.

¹⁶ *Id.*, at 11545, § 1690.15 (a)(4).

retiree and women’s groups)¹⁷ have opposed the use of remote online notarization (RON) for spousal consent to retirement benefit waivers, because we believe that RON is far inferior to in-person notarization in preventing fraud and coercion. However, given that the Board doesn’t appear to share those objections, and given that TSP has the technological capability to allow participants to submit remotely notarized forms electronically, it is mystifying why the Board would not keep requiring notarization and simply permit notarizations to be accomplished online, since its goal is to move transactions online. Eliminating notarization altogether, though it can be effectuated electronically, in favor of vague and undefined identification verification methods whose ability to protect against fraud or coercion is simply presumed and unsupported, creates a significant risk of undermining statutory spousal protections.

The proposed elimination of the notarization requirement is clearly not an issue of the recordkeeper being unable to handle notarizations, on paper or electronically – they already manage large defined contribution plans in the private sector,¹⁸ and those plans require *in-person* notarization (with a written or electronic signature) to name a non-spouse beneficiary. If they can handle these notarizations, they can certainly handle them for the TSP system, too. In light of the Board’s recent regulatory history with the issue of notarization (including capacity to accept online notarizations) and its recognition that notarization is an important component of protecting spousal rights, as well as its failure to assess the damage its proposal is likely to cause, the agency’s unexplained and inexplicable decision to eliminate notarization is arbitrary and capricious.

B. The Proposed Rule Contains No Standards or Regulations for Executing the Spousal Consent Requirement

It is also unclear under the Proposed Rule how, exactly, spousal consents will occur under this new record-keeping system – with or without notarization. While the TSP purports to retain the requirement for spousal consent as mandated by statute, it never specifies how, exactly, spousal consents will happen under this new recordkeeping system. Currently, participants’ withdrawal and loan requests are handled on the TSP portal with an online tool that guides the participant through the request process. However, if a spouse’s signature is required because the participant is married, the tool generates a summary form that the participant must print out, the spouse must sign and get notarized, and then the form is faxed or mailed back to TSP.¹⁹

This Proposed Rule implies that participants will have the ability to complete “most transactions” entirely online instead of using paper forms. Will annuity elections, withdrawals, and loans by married participants be one of them? If so, how will the spouse find out that a withdrawal is being

¹⁷ See e.g., Comment Letter of Karen Ferguson & Karen Friedman, Pension Rights Center, re: IRS Notice 2021-40, Physical Presence Requirement for Spousal Consents (Sept. 30, 2021), available at https://www.pensionrights.org/wp-content/uploads/2022/01/prc_comment_re_spousal_consent_n-2021-40_9-30-21.pdf; Comment Letter of National Women’s Law Center and other organizations, re: IRS Notice 2021-40, Physical Presence Requirement for Spousal Consents (Sept. 30, 2021), available at <https://nncdv.org/wp-content/uploads/2021/10/Sign-On-Letter-IRS-Notice-2021-40-Physical-Presence-Requirement-for-Spousal-Consents.pdf>; Comment Letter of David Certner, AARP, re: IRS Notice 2021-40, Extension of Temporary Relief from the Spousal Consent Physical Presence Requirement (Dec. 22, 2021), available at <https://www.aarp.org/content/dam/aarp/politics/advocacy/2021/12/spousal-consent-aarp-comment-letter-122221.pdf>.

¹⁸ See *Accenture News Release*, *supra*, n. 6.

¹⁹ TSP, *Withdrawing from Your TSP Account for Separated and Beneficiary Participants* 6 (Sept. 2020), Pub. TSPBK02, available at <https://www.tsp.gov/publications/tspbk02.pdf>.

requested, and how will the spouse's consent be obtained? How will her or his signature be affixed? How will the signature be authenticated to prove that it was the spouse (and not the participant) who actually consented? What will constitute proof of consent? Will participants simply be able to call the ThriftLine to request a withdrawal, and if so, how will spousal consent be obtained and proven on a phone call? The Proposed Rule answers none of these questions regarding how the spousal consent requirement will be implemented or demonstrated. As a result, the public lacks a meaningful opportunity to understand or provide comments about the implications of the Proposed Rule.

As was the case for the dispensing with the notarization requirement, the Proposed Rule provides no standards or requirements on the recordkeeper for implementing the spousal consent requirement. Again, it just punts to the recordkeeper: "To request a post-employment distribution, a participant must initiate a request in the form and manner *prescribed by the TSP record keeper.*"²⁰ Apparently, the entire policy and procedure for protecting spousal rights will be within the private recordkeeper's discretion. Coming on top of eliminating the notarization requirement, it is shocking that the Board's proposal also fails to describe and prescribe the basic mechanics of how the statutory requirement for spousal consent will be effectuated.

C. The Proposed Rule's Enforcement Provisions Are Wholly Inadequate

It is probable that a system that fails to spell out standards for obtaining and proving spousal consent, combined with one that imposes no requirement for notarization of the consent, will result in many more instances of fraud because it fails to prevent them at the front end. The Proposed Rule also falls short in specifying how the spousal consent requirement will be enforced at the back end – including any penalties for violations, and the remedies that will be provided to defrauded spouses – to deter and provide recourse for violations.

The only provision that seems aimed at addressing penalties for misrepresentations related to spousal consent is a "Certificate of Truthfulness" provision stating that, by virtue of making a request for a loan or a withdrawal, the participant will be deemed to have certified that all information provided to the recordkeeper is true and complete, under penalty of perjury.²¹ This is utterly inadequate to deter and penalize misconduct that could irrevocably deprive one's spouse of jointly owned assets needed in retirement. Even the Board's Interim Rule suspending the notarization requirement due to COVID was more pointed, warning participants that "any intentional false statement or willful misrepresentation concerning their marital status or provision of their spouse's consent is punishable by fine or imprisonment of up to 5 years, or both. 18 U.S.C. 1001,"²² even though, in our view, this statutory provision would not sufficiently penalize a wrongdoing participant.²³

Instead, the Board should substantially strengthen its penalties and procedures for addressing fraudulent spousal waivers by participants. For instance, the Board could resurrect provisions similar to the more meaningful provisions for detecting and prosecuting violations that were included in the

²⁰ *Proposed Rule*, *supra* n. 1, at 11532, § 1650.24.

²¹ *See id.*, § 1650.4 at 11530 and § 1655.18 at 11543.

²² *Temporary Waiver*, *supra* n. 4, at 21311.

²³ This statutory provision is an all-purpose prohibition against lying to the federal government. There is no mechanism for alerting TSP about possible fraud and theft, and no indication of what TSP would do if so alerted.

2003 rule. That rule included a “Certificate of Truthfulness,” but it also included provisions specifying that spouses could submit allegations of misrepresentation and fraud, which would prompt the Board to ask for 3 samples of the spouse’s signature and to begin an investigation. If that investigation found evidence of fraud, the regulation specified that the Board “will refer” the case to the Department of Justice for prosecution and if the participant was still employed, to the Inspector General of the participant’s employing agency.²⁴ This Proposed Rule should ensure there is a complaint mechanism for spouses, so that in the event they suspect or discover fraud, they have information on how to contact and file a complaint with TSP.

In addition, the TSP system should include recourse and remedies for the defrauded spouse. A spouse whose share of TSP funds has been taken and spent could raise that issue in a divorce proceeding. This obviously provides no recourse for spouses that do not divorce. But even for divorcing spouses, this avenue for recourse is lengthy, expensive, and likely would occur after the funds have been taken and possibly depleted; other assets may be inadequate to compensate the defrauded spouse. Currently, the Proposed Rule only permits, it does not require, the recordkeeper to freeze an account upon suspicion or actual knowledge of fraud.²⁵ Instead, as a basic precaution, TSP and the recordkeeper should be *required* to freeze a TSP account if it has a suspicion or knowledge of fraudulent activity. Contact by a spouse alleging suspicion or discovery of fraud should automatically trigger a freeze of the account (if it still exists).

The Board should also consider adding a provision that, in cases in which a participant has committed fraud in the execution of a TSP spousal consent, some of the participant’s FERS payments can be diverted to the spouse until the full amount of misappropriated funds has been repaid. If TSP or its recordkeeper acted negligently or with reckless disregard of the spouse’s rights, TSP should be liable for breach of fiduciary duty and making the spouse whole.

The bottom line is that this Proposed Rule effectively vitiates the statutory requirement for spousal consents in the TSP system. It eliminates the one requirement – notarization – that could actually help *prevent* fraud or coercion before it happens; it fails to specify any standards or procedures for how spousal consents will actually be obtained and demonstrated; and the after-the-fact enforcement system is toothless, with no mechanism for receiving and acting on allegations from spouses, or remedying violations. **This regime is the functional equivalent of putting participants on the honor system and transforming the statutory mandate for spousal consent into a request.**

II. The Proposed Rule Does Make Some Helpful Improvements in Handling Divorce Court Orders

In contrast to its treatment of spousal consent, the Proposed Rule does make several helpful improvements to the regulations governing Retirement Benefits Court Orders (RBCOs) in divorce. According to the Preamble, TSP currently rejects and refuses to review draft RBCOs, accepting only court-issued orders. The Proposed Rule would allow the parties to submit draft court orders for review to determine whether they are qualifying, in order to ensure smooth acceptance once the

²⁴ See § 1650.4, 2003 Rule, *supra* n. 5, at 35504.

²⁵ Proposed Rule, *supra* n. 1, § 1690.15(a)(4), at p. 11545.

order is approved by court.²⁶ The Proposed Rule also clarifies that the parties can appeal TSP's rejection of a RBCO as nonqualifying.²⁷ Finally, the Proposed Rule provides for a much longer period during which an account may be frozen after a RBCO is rejected as not qualifying. Currently, freezes are removed after only 45 days; the Proposed Rule would extend this to 18 months (like ERISA), or until the parties jointly request that the freeze be terminated, whichever is earlier.²⁸

However, there are some tweaks we would suggest to make the regulations clearer. Subsection (c) of proposed § 1653.3 states that accounts will be frozen upon receipt of a *draft* RBCO,²⁹ but subsection (h), which deals with unfreezing accounts, speaks only in terms of orders “purporting to require a payment from the TSP.”³⁰ It is unclear whether draft RBCOs (vs. actual certified court orders that are rejected as nonqualifying) are included in this “purporting” language and thus subject to the new lengthened freeze period. It would be helpful if the actual proposed regulation was revised to explicitly include draft orders or possibly add a definition of “purporting to require a payment.”

Freezing the account upon receipt of a draft RBCO, is an important step forward. We also urge the Board to consider adding a requirement that, as soon as TSP is notified of an impending divorce by either the participant or the spouse, the recordkeeper should be required to freeze the account. Retirement savings are a marital asset subject to division in divorce, so the Board and its recordkeeper should take every precaution to preserve that asset until it receives a qualifying order regarding if, and how, to divide it.

Finally, the Proposed Rule states that orders can no longer use a formula to divide the account, but rather must specify a percentage or dollar amount to be awarded.³¹ This change will increase the instances in which the payee's attorney preparing the court order will need to do their own calculation of the payee's share. Such a calculation is most often needed to determine which portion of the account was earned during the parties' marriage. Up to this time, TSP has made this and other information about the account very convenient, free, and accessible for former spouses to obtain through the submission of form TSP-92D.³² It is very important that TSP continue to make this information easily available to prospective payees and their representatives through the future recordkeeper. The Proposed Rule on the calculation should be revised to require that information about the accounts must be very convenient, free, and accessible for former spouses to obtain.

III. The Proposed Rule Should Be Revised to Specify that Annual Statements Will Continue to Be Sent on Paper by Default

The Board doesn't appear to be changing the *language* in § 1640.6, but we want to make sure that the Board's *practices* regarding delivery of account statements aren't changing either. Currently, though

²⁶ *Id.*, §§ 1653.2, 1653.3, at 11537. We also note that the Proposed Rule imposes a new, steep, and unfortunate \$600 fee on participants for the recordkeeper's review of a draft or final court order. § 1653.6 at 11539. Presently, review of a final court order is free of charge. It is unclear, however, what would happen if a certified order was rejected as nonqualifying, and then an amended order was sent to TSP for qualification. Would the second order incur a second fee? Permutations should be addressed in the regulation, not left to the recordkeeper's discretion.

²⁷ *Id.*, at 11519.

²⁸ *Id.*, at § 1653.3(h)(2)(ii) at 11537.

²⁹ *Id.*, § 1653.3(c) at 11537.

³⁰ *Id.*, at § 1653.3(h) at 11537.

³¹ *Id.*, §§ 1653.2 - 1653.4 at 11537-38.

³² TSP, Request for Participant Account Information, TSP-92-D, available at <https://www.tsp.gov/forms/tsp-92d.pdf>.

paper statements are not mentioned in § 1640.6, the Board’s practice is that the first three quarterly statements of the year are simply made available on the TSP website; they are delivered online by default, although participants can affirmatively request paper statements be sent. However, the fourth-quarter annual statement is delivered to participants on paper in the mail by default, though they can request electronic access only. What is clear is that the overwhelming majority of participants want to keep that annual paper statement. According to the Department of Labor, a very small fraction of all FERS-covered TSP participants – just 3 percent – have opted out of mail delivery of an annual statement on paper.³³

Having annual paper statements delivered to one’s doorstep, that can be read, reviewed, and easily preserved for future reference, is an extremely important part of assisting participants to understand their investments, plan for retirement, and possibly later prove their entitlement to benefits. This is too important to leave to the discretion of the recordkeeper. The Board should revise the regulations in Part 1640 to specify that participants shall receive their annual, end-of-year/fourth-quarter statement on paper in the mail, unless the participant affirmatively opts out and chooses to receive it only via the website.

Conclusion

Making information and transactions available online, quickly and conveniently, can be a great service to participants and beneficiaries. But it is important not to sacrifice important substantive rights, and overall transparency to stakeholders, in the process. The Board should be specifying policies and procedures, and the vendor should design its system to implement those policies and procedures. Unfortunately, in many instances, this Proposed Rule appear to be doing the reverse: eliminating important rights, or simply being silent about them, and then leaving it the recordkeeper to invent policies and procedures, with no public scrutiny or accountability.

It is particularly disappointing that the Board proposes to promulgate a rule that would eliminate the most important safeguard for protecting spousal rights, and thereby effectively nullify statutory spousal consent protections. This will most certainly jeopardize the retirement security of spouses in general, and women in particular. The Board should make major changes of the sort discussed above before promulgating a final rule.

Sincerely,



Karen Friedman
Executive Director
Pension Rights Center



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



Cindy Hounsell
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³³ DOL, Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, Proposed Rule and Request for Information, 84 Fed Reg 56894, 56897, available at <https://www.govinfo.gov/content/pkg/FR-2019-10-23/pdf/2019-22901.pdf>.