December 22, 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: Notice 2021-40, Extension of Temporary Relief from the Spousal Consent Physical Presence Requirement

AARP, on behalf of our 38 million members and all older Americans nationwide, is writing to express its concerns regarding potential guidance by the U.S. Treasury Department (Treasury) and the Internal Revenue Service (IRS) that would compromise important spousal protections in retirement plans by making permanent the current temporary relief under Notice 2021-40 from the physical presence requirement for witnessing spousal consents.

A priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. Participating employees, retirees, their spouses, and their other beneficiaries rely on these plans for their long-term financial security. Plan fiduciaries must carry out their responsibilities under the plan prudently and must exercise their duties for the exclusive benefit of, and with complete and undivided loyalty to, plan participants and beneficiaries.

AARP’s concerns in this matter relate to whether Treasury and the IRS should, on a permanent basis, eliminate the physical presence safeguards in the case of spousal pension waivers and consents, permanently allowing the current remote online notarization procedures to continue after the end of the extraordinary public health emergency that justified them as a temporary accommodation. The stakes for spousal beneficiaries and the risks are particularly high when participant spouses are asking nonparticipant spouses to surrender their rights to lifelong joint and survivor pensions. Accordingly, AARP believes it is crucial that spousal consents be provided only with rigorous and effective procedural safeguards, including physical presence, to facilitate independent authentication of the signer’s identity as the participant’s spouse and to help deter and facilitate detection of fraud, coercion, undue influence, and lack of understanding. Except for the extraordinary circumstances in which physical distancing has been required to combat the current pandemic, these longstanding safeguards, including physical presence, are workable and not burdensome.
**Summary**

The current temporary relief from the physical presence requirement for the witnessing of spousal consents was granted because of the extraordinary risks created by the COVID-19 public health emergency. As Treasury and IRS originally intended when temporarily suspending the physical presence requirement, the requirement should be reinstated (together with other appropriate safeguards) once the current social distancing need and associated distancing measures in these unprecedented emergency circumstances have ended.

The issue here is not the merits of remote online notarization in general. In our view, remote notarization combined with other adequate procedural safeguards can be appropriate in certain contexts and for certain purposes. The issue here, however, involves a transaction of unusual import and sensitivity, in which a spouse irrevocably gives up her or his rights to a lifetime pension. This raises unique risks and fundamental concerns relating to the need to protect older Americans in general, and widows in particular, from poverty, exploitation, and elder abuse.

Protection of spousal rights to pensions is a fundamentally important and longstanding policy of pension law under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code). Congress recognized the unique potential for conflicts of interest between spouses regarding what, for many, could be the most consequential financial issue they ever face -- and the associated opportunities for deception, undue influence, exploitation, and other bad behavior. This issue has special import for women; lifetime survivor benefits are crucial to their long-term economic security. As other stakeholders have described in their comments, women tend to be particularly vulnerable: compared to men, they generally live longer in retirement yet have less Social Security benefits (because of fewer years in the workforce earning wages and because of lower wages than men), have less savings, have fewer and smaller private pensions, rely far more often and more heavily on their spouse’s pension income, and suffer higher rates of elderly poverty, especially when widowed.

Accordingly, once there is no longer a need for COVID-related social distancing, there will be no justification for failing to adequately protect spouses from fraud, coercion, other undue influence, or other financial or elder abuse by permitting plan administrators to take short cuts in the pursuit of administrative convenience and cost cutting. As discussed below, assertions from some stakeholder groups that they have not heard about problems from members that have no obligation to share such information do not constitute credible evidence as to whether the remote online notarization and associated retirement plan spousal consent procedures currently...

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1 Treas. Reg. § 1.401(a)-21(d)(6).
2 Public Law 93–406.
permitted as a temporary accommodation during the COVID-19 public health emergency have in fact provided adequate protection, and there is no sound basis for continuing those temporary procedures once the current, extraordinary circumstances have changed.

**Spousal Pension Rights and Physical Presence Requirement**

Congress has made very clear that the protection of spousal rights to pensions is a fundamental element of national retirement policy, as reflected in the Code and ERISA. Sections 401(a)(11) and 417 of the Code and parallel provisions of ERISA, added by the Retirement Equity Act of 1984, provide generally for spouses of pension plan participants to receive qualified lifetime survivor annuities upon the participant’s death, whether before or during retirement. Participants can elect to waive a spouse’s qualified survivor benefits, but only if the spouse provides informed and written consent to the waiver, and only if “witnessed by a plan representative or a notary public”.

When issuing final regulations on spousal consents in retirement plans more than two decades ago, Treasury and the IRS stated that “. . . the statutory requirement that spousal consent be witnessed either by a notary public or a plan representative appears to presuppose that a spouse be in the physical presence of the notary public or the plan representative at the time consent is given.” Accordingly, Treasury regulations have consistently interpreted this statutory witnessing requirement to mean that the signatures of participants electing to waive spousal benefits and of spouses consenting to the waiver must be witnessed in the physical presence of a plan representative or notary.

Written spousal consent and related witnessing requirements apply also in qualified retirement plans, such as 401(k) plans, that are not pension (defined benefit or money purchase) plans. The spousal consent applies under these non-pension plans mainly if a married participant wants to designate an individual other than their spouse to receive the participant’s plan benefits after the participant dies.

During the COVID-19 public health emergency, Treasury and the IRS have provided temporary relief, subject to certain conditions, from the physical presence requirement if participant waivers and spousal consents use remote online notarization. The temporary relief, twice extended, currently lasts through June 30, 2022. The rationale for the temporary relief has been the concern raised by some stakeholders that COVID-19 social distancing measures have made it difficult, if

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4 Public Law 98-397.
5 Code Section 417(a)(2)(A).
7 Treas. Reg. 1.401(a)-21(d)(6)(i), (ii). The regulations permit a notary public to provide an electronic notarization acknowledging a spouse’s signature “if the signature of the spouse was witnessed in the physical presence of a notary public.” Id. In other words, “electronic” notarization (which can occur without regard to whether the spouse is physically present with the notary) should be distinguished from “remote online” notarization, in which the spouse is not physically present with the witnessing notary.
not impossible, to obtain spousal consent in the physical presence of a plan representative or notary (apparently taking into account the resulting difficulty of arranging for notaries to meet other people at a specified location). Treasury and the IRS also have requested comments on whether the physical presence requirement should be retained as is or should be permanently modified (including possible removal subject to conditions). In addition, Treasury and the IRS have asked, among other things, whether there is evidence that the temporary removal of the requirement has resulted in fraud, spousal coercion, or other abuse, and “how, if the physical presence requirement is permanently modified, increased fraud, spousal coercion, or other abuse may be likely to result”.

**The Longstanding Physical Presence Safeguard for Spousal Consents Is Based on a Sound Regulatory Analysis**

This is not the first time business interests have tried to persuade regulators to strike a different tradeoff between protecting spousal rights and facilitating administrative convenience. In 2005-06, industry representatives advocated for replacing the physical presence requirement with the use of a spousal PIN to sign a spousal consent. After careful consideration, the Treasury Department and IRS rejected these suggestions and retained the requirement that spousal consents be witnessed in the physical presence of a plan representative or notary public.

The preamble to the 2006 final regulations provides insight into the Treasury/IRS analysis underlying this conclusion. While permitting notaries to use electronic means of notarizing spousal consents (i.e. affixing the notary’s signature and seal), the preamble indicates that whether a plan’s electronic system used in making participant elections or spousal consents is “reasonably designed to preclude any person other than the appropriate individual” from making the election is based on the facts and circumstances, and that a relevant factor is whether the “election has the potential for a conflict of interest between the individuals involved in the election”.

Unfortunately, for a number of reasons, there is great potential for conflict of interest between a plan participant and the participant’s spouse when the participant seeks to waive spousal survivor benefits.

- First, in most of these instances, the participant and spouse are unavoidably involved in a zero-sum game: the participating spouse’s benefits will increase if the nonparticipating spouse can be induced to give up her or his survivor benefits.

- Second, the stakes are extraordinarily high: giving up a spouse’s rights to a lifetime survivor pension could be, for many, the most consequential financial decision they ever face.

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10 See IRS Notice 2021-03, page 4. Some notarizations have maximized both pandemic precautions and spousal financial security precautions by being held in person but out of doors (“front porch”, “backyard”, or “drive-by” notarizations).


• Third, in this country, where roughly half our marriages end in divorce, the risk is evident. Moreover, as so many know from personal experience, serious marital conflicts over money are by no means limited to couples who are or will be divorcing; regrettably, marital differences over money are a traditional source of conflict.

• Fourth, spousal consent situations are inherently fraught: when a nonparticipant spouse is being asked to give up her or his rights to a lifetime survivor pension, the risks that her or his consent will be unduly influenced or inadequately understood are heightened because the participant spouse has already elected a form of benefit (typically a single life annuity or a single, lump sum payment) that would deprive the other spouse of lifetime survivor protection.

• Finally, in addition to the magnitude of this potential conflict of interest when survivor pensions are involved, the location of this type of conflict within the marital household makes it both hard to prevent and often hard to detect while or after it occurs. These risks are not limited to outright coercion or a “traditional” type of deception involving a participant’s girlfriend or other collaborator standing in for the spouse or a participant claiming to be unmarried. As an alternative, participants might assure their spouses, for example, that there is no need to read the technical fine print, as signing the consent is simply a paperwork formality that the plan requires them to comply with as a condition of receiving “their” retirement benefits as soon as possible (in a single life annuity or lump sum) or paying both of them their joint pension in the future.

Therefore, in order for plan administrative personnel to meet ERISA’s high “prudent expert” standards in performing their fiduciary responsibilities when implementing plan provisions, spousal consents to surrender their lifetime survivor benefits require maximum safeguards against misunderstanding, outright deception, coercion, or other improper behavior.

There is No Credible Evidence That the Risks of Abuse Have Not Materialized During the Pandemic

Treasury and IRS would have no sound basis on which to make a factual finding that remote online notarization of spousal consents, as currently conducted, has not opened the door to abuse. Assertions from business groups that their members have reported no apparent problems resulting from remote online notarization and spousal consents during the pandemic do not constitute meaningful evidence that physical presence is unnecessary to prevent fraud, coercion, or undue influence in spousal consents. The “nothing to see here” reports from corporate plan sponsors and recordkeepers generally are referring to their impression that remote online notarizations have been taking place without disruption of plan operations (which of course is not the main issue), without complaint from plan administrative personnel (many of whom have enjoyed a reduction of their duties), and without those personnel being aware that anything untoward has occurred. Yet in most instances, any fraud, deception, undue influence, coercion, or other abuse is, by its nature, unlikely to come to a plan administrators’ or notaries’ attention, and is even less likely to come to light if the putative spouse is not in the physical presence of the notary or plan representative.
In fact, experienced notaries have observed that remote online notarization can be tainted by signers (such as spouses) being influenced or coerced by parties in the background or standing off to the side, out of camera range, so that notaries will be unaware that signers are participating in a transaction they do not approve or understand. Given these vulnerabilities, notaries using remote online notarization have been advised to try to listen for voices in the background and try to determine whether the signer’s eyes seem to show that the signer is consulting or being influenced by people who are off-camera. However, not surprisingly, the notarial profession apparently has not found any reliable or standardized way to take these precautions during remote online notarization that would achieve a sufficient level of assurance that a spouse’s consent to irrevocably surrender her or his survivor benefits is freely given and informed (considering the special risks posed by such spousal consents).

Business community representatives have urged Treasury and IRS to compromise these important protections in the name of administrative convenience by allowing remote online notarization and witnessing of spousal consents without requiring additional safeguards. But those who contend that the lack of physical presence during remote online notarization of spousal consents has not caused problems are hardly disinterested. The recordkeeping industry, corporate plan sponsors, and their personnel who administer spousal consents have a strong interest in minimizing administrative requirements and safeguards to save staff time and other costs. Other businesses asserting that remote notarization has no adverse effects include vendors of remote notarization or businesses that otherwise benefit financially from it.

Especially in DB plans, evidence of fraud is unlikely to come to light, especially if not discovered at the signing. One reason is that many nonparticipant spouses might not even be aware that their participant spouse has accrued vested DB pension benefits, which often are not payable for many years and are neither very visible nor very well understood. Unlike most 401(k) plans, which provide quarterly benefit statements reporting on current account balances, DB pension benefit statements are required only once every three years, and the DB benefits are not framed in a way that is as tangible or salient as an account balance. In some cases, the actual spouse is unaware that someone asserted to be the spouse is brought in to provide consent. In other cases, the actual spouse consents after having been assured that the signature is a mere paperwork formality, and without having understood the actual consequences. In either case, the funds can then be quickly spent or diverted. The spouse, plan administrator, or notary might never know or might find out only too late. If not deterred or detected before it occurs, undue

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1 Kelly Rush, “How to Prevent Fraud as a Remote Online Notary” (Sept. 2, 2020) National Notary Association. This presentation by a notary recognizes the real risks of fraud, coercion, and other undue influence. It suggests several ways a notary can try to reduce these risks when using remote online notarization, but does not conclude or provide evidence that those approaches will necessarily be effective enough for the special risks posed by a spouse’s agreement to give up her or his lifetime survivor pension benefits.

14 Id.

15 Some plan sponsors will be concerned about the risk that, absent full safeguards including physical presence, surviving spouses would later claim that the plan administrators breached their fiduciary duties under ERISA and should be held liable for the loss of survivor benefits. However, these plan sponsors would not be expected to speak up and express these concerns in a rulemaking; they and their trade associations would be unlikely to advocate for additional regulatory requirements to impose safeguards because they know individual plan sponsors are always free to impose such safeguards on their own.

16 See, e.g., Hearn v. Western Conference of Teamsters Pension Trust Fund, 68 F. 2d 301 (9th Cir. 1995) (fraud not discovered until after participant’s death)
influence or coercion of a spouse to consent to a lump sum or beneficiary change, for example, is unlikely to come to light later.

In case there is a reason later to suspect the validity of the spousal consent, it is important to have a way to independently authenticate the signatory’s identity, such as the spouse’s handwritten signature evidencing consent, as opposed to use of a separate PIN for the spouse, for example.17 In any event, even if fraud came to light and even if the plan chose to make the defrauded spouse whole, many plans would still avoid going out of their way to own up to the occurrence of fraud on their watch, for example, by disclosing it in response to a voluntary industry questionnaire or survey. Disclosure might expose them to lawsuits for fiduciary breach or negligence, not to mention embarrassment for themselves and their company. Accordingly, there is little basis for industry groups’ assertions that the recent suspension of the physical presence requirement apparently has not led to fraud or abuse thus far.

Again, the issue here is not the appropriateness of remote online notarization and witnessing in general. The issue is whether Treasury and the IRS should, on a permanent basis, eliminate the physical presence safeguards in the case of spousal pension waivers and consents, permanently allowing the current remote online notarization procedures to continue after the end of the extraordinary public health emergency that justified them as a temporary accommodation.

As discussed, the stakes for spousal beneficiaries and the risks of fraud, coercion, other undue influence, exploitation, or elder abuse -- or lack of understanding -- are particularly high when participant spouses are asking nonparticipant spouses to surrender their rights to lifelong joint and survivor pensions. Accordingly, AARP believes that spousal consents should be provided only with rigorous and effective procedural safeguards, including physical presence, to facilitate independent authentication of the signatory’s identity as the participant’s spouse and to help deter and facilitate detection of fraud, coercion, undue influence, and lack of understanding.18 Except for the extraordinary circumstances in which physical distancing has been required to combat the current pandemic, these longstanding safeguards, including physical presence, are workable and not burdensome. In fact, other stakeholders have suggested that these ordinary, longstanding safeguards, including physical presence, actually should be augmented by additional protective measures. Moreover, as noted, the assertions of plan sponsors and recordkeepers that they have not heard about problems should not be viewed as credible evidence as to whether the current, temporary remote online notarization and associated procedures have actually been providing, or would provide, spouses adequate protection. There is no sound basis, therefore, for continuing the temporary procedures on a permanent basis once the current, extraordinary circumstances have changed.

17 Industry representatives have tried in the past to persuade regulators that giving nonparticipant spouses their own separate PIN would be an adequate substitute for physical presence. Appropriately, Treasury and the IRS were not persuaded. PINs provided long before they are needed are often lost, but providing a PIN to a nonparticipant spouse in anticipation of an imminent surrender of spousal benefits is subject to risks similar to those affecting the spousal consent itself, including the participant spouse opening the nonparticipant spouse’s mail or email. Of course, especially when marital relationships are still good, spouses often share PINs in the interest of convenience. And even when relationships have unfortunately soured, spouses who have a major incentive to do so can often locate each other’s PINs.

18 Because other stakeholders already do so effectively in their comments, we are not detailing here the specific shortcomings of remote online notarization and witnessing in the case of spousal consents to waive spousal pension rights nor are we enumerating specific safeguards (in addition to physical presence) that should be required. Others also discuss the fact that accurate and reliable biometric safeguards have yet to become widely available, and in any event would be relevant only to the authentication of a signatory as the participant’s actual spouse as opposed to the risks that the actual spouse will be subject to coercion or other undue influence, or will fail to appreciate the full import of the waiver and consent.
If you have questions or if we can be of further assistance in relation to these issues, please feel free to call me or have your staff contact Jasmine Vasquez, director, Financial Security, Government Affairs, AARP, at (202) 434-3711.

Sincerely,

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