

March 30, 2023

**Submitted via regulations.gov**

Arslan Malik and Pamela Kinard  
Attn: CC:PA:LPD:PR (REG-114666-22)  
Internal Revenue Service, Room 5203  
P.O. Box 7604, Ben Franklin Station  
Washington, DC 20044

**RE: Use of an Electronic Medium to Make Participant Elections and Spousal Consents (RIN 1545-Bq50) <https://www.regulations.gov/document/IRS-2023-0002-0001>**

Dear Mr. Malik and Ms. Kinard:

The National Women's Law Center (NWLC) and the undersigned organizations appreciate the opportunity to comment on the Internal Revenue Service/Treasury's proposed rule to eliminate the physical presence requirement for the witnessing of spousal consents to surrender the spouse's rights to retirement benefits. We are writing in strong opposition to this proposal, which would sacrifice critical legal protections for spouses' retirement security. Instead, IRS/Treasury needs to strengthen spousal protections applicable to both in-person and, if permitted, remote witnessing of spousal consents.

Pensions earned and retirement assets saved during a marriage are a marital asset, perhaps the most valuable one a couple owns (other than a home). ERISA provides that the spouses of retirement plan participants will automatically receive a surviving spouse pension from a traditional defined benefit pension plan, and must be the named beneficiary of a 401(k)-style retirement account, unless the spouse provides witnessed, signed consent to give up those rights. The requirement for properly witnessed spousal consent to surrender guaranteed rights to retirement benefits has been a cornerstone of protecting spousal pension rights for nearly four decades. Proper witnessing has required the spouse's signature to be affixed in the *physical presence* of the notary or plan administrator, in order to help prevent and deter participants from engaging in fraud or coercion to get that signature.

This longstanding spousal protection recognizes both that future retirement security is at stake, and that a very real conflict of interest exists between the spouses over the form and timing of retirement plan payments. To put it bluntly, eliminating the benefits for a surviving spouse means more money for the participant-spouse (or a different beneficiary).

Women reach retirement with fewer assets than men, due to lower pay, a greater likelihood of working for an employer with no retirement plan, and more time out of the workforce spent caregiving. In addition, women are more likely to outlive their husbands, and have higher health costs: thus, they need more retirement income, rather than less, over their lifetime. As a result, while spousal pension rights apply to both women and men, the right to collect a surviving spouse pension or to inherit a worker's 401(k) balance is disproportionately more important to

the retirement security of women than men.<sup>1</sup> The protection is robust because it needs to be: if the participant wants access to retirement savings or a larger retirement income during his lifetime, or even to deprive the spouse of any retirement funds, he may put significant pressure on the spouse to sign away her rights.

When the COVID pandemic shut down businesses and limited face-to-face transactions, it made sense for the IRS to *temporarily* waive the physical presence requirement and permit retirement plans to accept spousal consents that had been remotely notarized or witnessed online (e.g., over Zoom). For nearly two years, however, notaries have been available for in-person services. In other words, no public health emergency justified waiving the physical presence requirement, yet the Service extended the waiver – and now proposes to permanently eliminate the in-person requirement altogether.

We have significant concerns about permanent elimination of the physical presence requirement, especially given instances of employee-spouses forging the signature of the non-employee spouse, using imposters posing as the spouse, and coercing or otherwise pressuring a spouse to sign the consent form. Economic control is a component of domestic violence, which increased during the COVID pandemic and lockdowns.<sup>2</sup> Advocates for survivors of domestic violence have reported that abusive spouses prevented survivors from accessing stimulus payments, tax refunds, and other economic benefits.<sup>3</sup>

Physical presence is not fool-proof, but the efficacy of remote online notarization platforms to confirm identity is overstated and unproven. Their “credential analysis” just checks ID to ensure that the photo is in the right place, the verbiage is correct, and the ID has not expired. Unlike an in-person notary, an online notary cannot look or feel for signs of tampering, or physically inspect the visual (holograms) and tactile (raised lettering) security features of government IDs that are intended to prevent forgeries. Worse, so-called “knowledge-based authentication,” which has been widely discredited in an age of widespread hacking,<sup>4</sup> is virtually meaningless as applied to married couples who know key facts (like previous addresses) about each other. Unfortunately, it usually takes many years for evidence of this kind of fraud to come to light.

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<sup>1</sup> National Women’s Law Center, *Increasing Spousal Protections in Retirement Accounts Would Increase Women’s Retirement Security*, n. 3 (Mar. 2014), at

[http://nwlc.org/sites/default/files/pdfs/social\\_security\\_spousal\\_protections\\_march\\_2014.pdf](http://nwlc.org/sites/default/files/pdfs/social_security_spousal_protections_march_2014.pdf); Pension Rights Center, *Understanding Survivor Benefits in Private Retirement Plans* (Nov. 2, 2020), at

<https://www.pensionrights.org/publications/fact-sheet/understanding-survivor-benefits-private-retirement-plans>.

<sup>2</sup> Karen Nikos-Rose, *COVID-19 Isolation Linked to Increased Domestic Violence, Researchers Suggest Financial Stress Contributes* (UC Davis, Feb. 24, 2021) at <https://www.ucdavis.edu/news/covid-19-isolation-linked-increased-domestic-violence-researchers-suggest>; Leah Rodriguez, “Domestic Violence Increased in the US by 8.1% During the COVID-19 Pandemic,” *Global Citizen* (Mar, 2, 2021), at <https://www.globalcitizen.org/en/content/domestic-violence-covid-19-increase-us-ncccj-study/>.

<sup>3</sup> See e.g., Meera Jagannathan, “Domestic abusers are taking survivors’ stimulus checks — and lawmakers want the IRS to do something about it,” *MarketWatch* (Aug. 4, 2020), at <https://www.marketwatch.com/story/my-abusive-soon-to-be-ex-husband-is-withholding-my-half-of-the-stimulus-check-why-some-domestic-violence-survivors-still-havent-gotten-relief-payments-2020-07-23>; *Increased Financial Risk/Economic Abuse Experienced by Victims due to COVID-19* (Duke Sanford School of Public Policy, July 1, 2020), at <https://sites.sanford.duke.edu/genderviolencepolicy/2020/07/01/increased-financial-risk-economic-abuse-experienced-by-victims-due-to-covid-19/>.

<sup>4</sup> See e.g., GAO, *Data Protection: Federal Agencies Need to Strengthen Online Identity Verification Processes* (May 2019), at <https://www.gao.gov/assets/gao-19-288.pdf>.

In addition, remote witnessing is an inferior method for detecting whether the signer is being coerced or pressured. The webcam's field of vision is extremely narrow, and is focused on the signer; it does not "see" others, in the room or just outside but in earshot, who may be exerting undue influence. An in-person notary, in contrast, can see that there are others in the room and assess whether the employee-spouse or others who may be present appear to be pressuring the non-employee-spouse; the in-person witness can also ask others to leave and separately question the signer to determine if consent is informed and willing. Moreover, online interactions make it more difficult to discern cues and read body language in order to gauge diminished capacity or duress.

For all of the foregoing reasons, the undersigned strongly urge IRS/Treasury to expressly retain the physical presence requirement. At the very least, it should strengthen the proposed protections. Specifically, at a *minimum*, Treasury/IRS should require:

1. Separate communications for spouses. For all spousal consents, regardless of how they will be witnessed, plans should be required to communicate separately with spouses based on the spouse's communications preferences, secured by at least two-factor authentication (requiring possession of device). Spouses should receive separate explanations of their benefits and rights and confirmations of consents, and be the one who decides whether they want to use in-person or remote witnessing.
2. Custody and retention of records. IRS/Treasury *absolutely must require* a remote notary who witnesses and records remote notarization of a spousal consent form to immediately send recordings directly to the plan. Until all possible benefits have been paid, the *plan* needs to be required to retain all records and be able to produce them if ever needed.
3. Liability for failures. Because remote witnessing creates new opportunities for fraud and coercion, plans that accept it should either be strictly liable for any failures that later surface (whether negligent or purposeful). Alternatively, there should be limits on the amount of the benefit that can be alienated using it. Remote online notarization platforms should be prohibited from disclaiming liability for failures by a remote notary.

We urge the IRS to restore the physical presence requirement for spousal consents. However, in any case, the agency should strengthen protections for spouses. Please do not hesitate to contact Amy Matsui, Director of Income Security at NWLC ([amatsui@nwlc.org](mailto:amatsui@nwlc.org)), should you have any questions. Thank you for the opportunity to submit this comment.

Sincerely,

National Women's Law Center  
Alliance for Retired Americans  
American Postal Workers Union, Retirees Department, AFL-CIO  
Equal Rights Advocates  
Esperanza United (formerly Casa de Esperanza: National Latin@ Network)  
National Caucus & Center on Black Aging

National Committee to Preserve Social Security and Medicare  
National Consumers League  
National Domestic Violence Hotline  
National Employment Law Project  
National Network to End Domestic Violence  
National Organization for Women  
National Partnership for Women & Families  
National Retiree Legislative Network  
Social Security Works  
Tahirih Justice Center  
United Food and Commercial Workers International Union  
Women Employed  
Women's Law Project