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By Electronic Filing

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**Re: Proposed Regulations Concerning Use of Electronic Technologies for Providing Employee Benefit Notices and Transmitting Employee Benefit Elections and Consents**

### **Introduction**

The National Women's Law Center, the Pension Rights Center, OWL - The Voice of Midlife and Older Women, the National Committee to Preserve Social Security and Medicare, and the Alliance for Retired Americans (signatories) appreciate the opportunity to comment on the Internal Revenue Service's proposed regulations<sup>1</sup> to permit the use of electronic technologies (ET) to accomplish the transmission of notices and the execution of elections and consents. The signatories are women's, seniors', and consumer organizations working to safeguard existing pension protections and improve retirement security for women. In this context, the signatories have opposed proposals to weaken spousal protections and have supported efforts to close gaps and to extend and expand spousal pension rights.

Women are more likely than men to rely on their spouse's pension benefits in retirement. As a result, the pension benefit pay-out options available to a pension participant and spouse, the quality of the information provided to facilitate informed choices, and the rigor of the procedural protections required have a significant impact on widows' retirement security. Currently, under mandates established by the Retirement Equity Act of 1984 (REA),<sup>2</sup> which amended the Employee Retirement Income Security Act of 1974 (ERISA), a survivor annuity cannot be waived, nor a non-spouse beneficiary designated, without the spouse's consent.<sup>3</sup> And the specific legal requirements applicable to the process of obtaining valid spousal consent to waivers of survivor pensions play a pivotal role in effective enforcement of that spousal right.

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<sup>1</sup> Use of Electronic Technologies for Providing Employee Benefit Notices and Transmitting Employee Benefit Elections and Consents, 70 Fed. Reg. 40675 (proposed July 14, 2005) (to be codified at 26 C.F.R. pt. 1) [hereinafter Proposed ET Regulations].

<sup>2</sup> Retirement Equity Act of 1984, Pub. L. 98-397 (codified as amended at I.R.C. § 417 and 29 U.S.C. § 1055).

<sup>3</sup> I.R.C. § 401(a)(11); 29 U.S.C. § 1055(c)(2)(A).

In previous rulemaking proceedings, despite repeated pleas from representatives of plan sponsors, their consultants, and financial services providers,<sup>4</sup> the Service has been cautious about permitting use of ET in the spousal consent process. For instance, in a rulemaking that set forth guidelines generally allowing the use of ET in retirement plan administration, the Service declined to extend permission to use ET to the spousal consents required under § 417 of the Code and § 1055 of ERISA, noting 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. This appears to place significant limitations on the utility of electronic media in effecting spousal consent."<sup>5</sup>

The Service has been right to be cautious. The law is clear, and the stakes for women's retirement security are enormous.

Now, the Service has proposed to extend the use of ET to spousal consents. Significantly, it has retained the legal requirement that any such consent be witnessed in the physical presence of a notary or plan administrator. While retaining the physical presence requirement makes clear that the Service was cognizant of and sensitive to statutory requirements and the need to maintain meaningful protections, the proposal overall still leaves too much unanswered and falls short in substantial respects. Without significant revisions to spell out more clearly and strengthen procedural protections, the signatories must oppose the current proposal.

The comments below first address the importance of survivor pensions to women and the absolutely pivotal role played by the spousal consent regulatory regime in assuring that the rights of spouses are protected. This first part of the comments also identifies the key features that any proposal to permit the use of ET must contain and the criteria it must meet in order to comply with the letter and the spirit of the law. The second part of the comments raises several questions not answered in the proposed regulations and evaluates the proposal against the articulated criteria to determine which elements of the Service's proposal satisfy the essential requirements, and those that fall short. The most serious shortcomings relate to the area of authentication. Finally, some additional concerns are discussed that merit the Service's reconsideration.

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<sup>4</sup> See, e.g., *New Technologies in Retirement Plans*, 65 Fed. Reg. 6001 (finalized Feb. 8, 2000) (to be codified at 26 C.F.R. pt. 1) [hereinafter 2000 ET Final Regulations] ("[C]ommentators have asked that the IRS and Treasury provide guidance on the use of electronic media for ... notices, elections, and spousal consents..." Explanation of Provisions, *id.* at 6004); *New Technologies in Retirement Plans*, 63 Fed. Reg. 70071 (proposed Dec. 18, 1998) (to be codified at 26 C.F.R. pt. 1) ("A few comments submitted [under another Announcement soliciting information on plan use of paperless technologies] ... requested guidance on the use of electronic media for waivers of the qualified joint and survivor annuity and the qualified preretirement survivor annuity, spousal consent, and related explanations under section 417." Explanation of Provisions, *id.* at 70075).

<sup>5</sup> 2000 ET Final Regulations, *supra*, at , 6004.

## Qualified Joint-and-Survivor Annuities<sup>6</sup> (QJSAs) Are Key to Widows' Economic Security

Women are far less likely than men to have pensions of their own, and even when they do, the size of their pension is much smaller. Under even the most generous definition of pension income, just 28% of women 65 and older received pension income in 2003, compared to 45% of men that age,<sup>7</sup> and the median amount of older (65+) women's pension income was half (\$6,000) the amount of older men's (\$12,000).<sup>8</sup> Women of working age (21-64) are catching up to men in their participation rates in 401(k) plans, but still lag well behind men in the amounts they accumulate: in 2002, the median 401(k) balance in women's accounts was \$10,000, compared to \$17,000 for men.<sup>9</sup>

Because women retire with little pension income of their own, they are far more reliant than men on their spouse's pension income. Nearly 9 in 10 (87%) older married women, compared to just about one-third (35%) of older married men, rely on their spouse's pension income while both are still alive.<sup>10</sup> And among widowed persons, 21% of widows compared to just 5% of widowers receive pension benefits based on the pension of a deceased spouse.<sup>11</sup> This income is critical to the economic security of widows. On average, women 60 and older experience a 47% drop in their total income upon widowhood.<sup>12</sup> The drop in pension income is responsible for about 21% of that halving,<sup>13</sup> in large part because so many (41%) widows of pensioners receive no survivor annuity after their husband's death.<sup>14</sup> It has been estimated that universal election of QJSAs would reduce the percentage of widows below 150% of poverty by 21 percentage points.<sup>15</sup>

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<sup>6</sup> Although these comments will focus on the impact of the proposed regulations on QJSAs, the Service should consider the concerns raised herein equally applicable to all other instances in which spousal consent is required, such as qualified preretirement survivor annuities (QPSAs), I.R.C. § 401(a)(11)(A)(2), loans using accrued benefits as security, I.R.C. § 417(a)(4), and even to 401(k)s. Although spousal protections for defined contribution plans such as 401(k)s are not nearly as broad as those that currently apply to defined benefit plans, there are some limited spousal consent requirements that apply. When a married worker seeks to designate someone other than the spouse to receive the 401(k) account balance in the event the worker dies while still a participant in the plan, the plan must abide by the same types of spousal consent requirements applicable to waivers of pension annuities. *See* I.R.C. § 401(a)(11)(B)(iii)(D); 29 U.S.C. § 1055(c)(2)(A).

<sup>7</sup> Ken McDonnell, Retirement Annuity and Employment-Based Pension Income, 26 EBRI Notes 7 (Employee Benefit Research Institute, Feb. 2005), available at <http://ebri.org/pdf/notespdf/0205notes.pdf> (last visited Oct. 10, 2005). These figures include income from both defined benefit and defined contribution plans, whether based on the employee's own record or based on being a surviving spouse, as well as any other "retirement annuity" income and income from individual retirement accounts, because of the "prevalence of lump-sum distributions from employment-based plans that could have been a source" of this income. *Id.* at 14, n. 2.

<sup>8</sup> *Id.* at 8, 10.

<sup>9</sup> Craig Copeland, 401(k)-Type Plan and IRA Ownership, 26 EBRI Notes 4 (Employee Benefit Research Institute, Jan. 2005), available at <http://ebri.org/pdf/notespdf/0105notes.pdf> (last visited Oct. 10, 2005).

<sup>10</sup> National Women's Law Center calculations based on Jan. 2001 Survey of Income and Program Participation.

<sup>11</sup> Pension & Welfare Benefits Admin., U.S. Dep't of Labor, Retirement Benefits of American Workers 103, Table D11 (1995), available at [http://dol.gov/ebsa/publications/redbook/sec\\_d.htm](http://dol.gov/ebsa/publications/redbook/sec_d.htm) (last visited Oct. 10, 2005).

<sup>12</sup> Karen C. Holden & Cathleen Zick, *Distributional Changes in Income and Wealth upon Widowhood: Implications for Private Insurance and Public Policy*, in Retirement Needs Framework, SOA Monograph M-RS00-1, at 69, 72 (Society of Actuaries, 2000), available at [http://library.soa.org/library/monographs/Retirement\\_Systems/m-rs00-1/m-rs00-1\\_VII.pdf](http://library.soa.org/library/monographs/Retirement_Systems/m-rs00-1/m-rs00-1_VII.pdf) (last visited Oct. 10, 2005).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 76.

<sup>15</sup> *Id.*

## Meaningful Spousal Consent Requirements Are Pivotal to the REA’s Spousal Rights Framework

The current legal regime governing the execution of a valid QJSA waiver is straightforward, not burdensome, and has proven to be an effective means of protecting spousal rights. The features that make it effective are:

1. **Informed Consent** – Participants must be given written explanations about the QJSA,<sup>16</sup> written in a manner calculated to be understood by the average person,<sup>17</sup> that describe the payout options available and their relative value,<sup>18</sup> explain the effect of an election or waiver of the QJSA,<sup>19</sup> and make clear that the spouse has the right to withhold consent to a waiver.<sup>20</sup> The consent form itself must explain and acknowledge the effect of a waiver.<sup>21</sup>
2. **In Writing** – The spouse’s consent to waive a QJSA must be in writing.<sup>22</sup> “Writing” is not defined in the statute but has been commonly understood to be a handwritten signature on a paper document.<sup>23</sup>
3. **Witnessed by a Notary or Plan Representative** – The spouse’s written consent — i.e., the signing of the consent form — must be witnessed by a plan administrator or notary public.<sup>24</sup> According to the National Notary Association, the physical, in-person presence of the signer is a cornerstone of reliable notarization.<sup>25</sup> It not only enables the notary to identify the signer, it also permits observation to ensure that the signer was not under “direct physical threat or duress” and was “awake and aware” of what she/he was signing.<sup>26</sup>

This framework has been effective because it recognizes the context in which decisions about waivers of spousal rights are made. In particular, it recognizes that husbands and wives don’t always have a unity of interest in economic matters, and because of potentially conflicting interests,<sup>27</sup> husbands who for whatever reason wish to deny their wives a widow’s pension might

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<sup>16</sup> I.R.C. § 417(a)(3).

<sup>17</sup> 26 C.F.R. § 1.417(a)(3)–1(a)(4).

<sup>18</sup> *Id.* § 1.417(a)(3)–1(b)-(d).

<sup>19</sup> I.R.C. § 417(a)(3)(A)(ii).

<sup>20</sup> *Id.* § 417(a)(3)(A)(iii).

<sup>21</sup> *Id.* § 417(a)(2)(A)(iii).

<sup>22</sup> *Id.* § 417(a)(2)(A)(i).

<sup>23</sup> In the past, the Service also appears to have understood the requirement for written consent to mean a handwritten signature on a paper document. *See, e.g.*, I.R.S., Sample Language for a Spouse’s Waiver to a QJSA or a QPSA, Notice 97–10, available at <http://www.unclefed.com/Tax-Bulls/1997/Not97-10.pdf> (last visited Oct. 11, 2005) (*E.g.*, “The plan administrator should add a line for the spouse’s signature and a place for the witness’ acknowledgment.” *Id.* at 44).

<sup>24</sup> I.R.C. § 417(a)(2)(A)(iii).

<sup>25</sup> National Notary Association, A Position on Digital Signature Laws and Notarization 4, 5 (undated), available at <http://www.nationalnotary.org/userimages/digitalSignature.pdf> (last visited Oct. 10, 2005).

<sup>26</sup> *Id.*

<sup>27</sup> “The potential conflict of interest between spouses rises from the fact that providing protection to a surviving spouse is costly...” Saku Aura, Does the Balance of Power Within a Family Matter? The Case of the Retirement

forge the consent papers or coerce the spouse to sign them. In other words, unlike other consumer transactions in which the perceived threat of fraud is deemed to come from outside the household, the REA recognizes that the threat to the right being protected — the spouse’s right to withhold consent to a waiver of the QJSA — comes from the *inside* the household, from someone who shares the spouse’s home and has easy access to the forms and the mailbox (and today possibly to PINs and passwords).

By providing some measure of protection from coercion and forgery, these procedural requirements go a long way toward preventing violations of spousal rights from occurring in the first place. But, even the current process is not fraud-proof. There are reported instances in which participants have lied about being married, turned in forged forms, and even had a girlfriend impersonate the wife in signing the consent form in front of a plan representative. The defrauded spouse may not learn of the fraud until the participant dies and she applies for survivor benefits, only to be told she had waived the QJSA. In such cases, under the current regime, there is a fourth feature of the process that provides critical legal back-up protection for spouses:

4. ***Capable of independent authentication*** —A handwritten signature on a consent form provides tangible evidence that can later be authenticated by an independent expert to determine whether it was *in fact* the spouse who signed the form.

A meaningful ability to challenge the validity of a spousal consent form, whether because it did not comply with statutory requirements or because it was forged, is an important back-stop protection, one that is implicitly recognized under ERISA. Section 1055(c)(6) provides that, in the event a plan fiduciary acts in accordance with fiduciary responsibilities and relies on what on its face appears to be a valid spousal consent form in paying benefits, the consent “shall be treated as valid for purposes of discharging the plan from liability *to the extent of payments made pursuant to such Act*” (emphasis added).<sup>28</sup> In *Hearn v. Western Conference of Teamsters Pension Trust Fund*,<sup>29</sup> a participant falsely claimed to be unmarried in order to elect a single life annuity. The surviving spouse did not learn of the fraud until two months after the participant’s death, when she applied for survivor benefits. The Ninth Circuit Court of Appeals held that § 1055(c)(6) offered only a limited discharge of liability, and that a plan is *not* discharged from any liability for payments that remain due but for the fraud.<sup>30</sup> The court ordered the plan to calculate the amount of its overpayment to the participant, subtract it from the amount that would have been paid to the surviving spouse in the absence of the fraud, and to pay the remaining benefits to the surviving spouse.

Although the *Hearn* case did not involve the need to verify a forged signature, the case confirms that the statutory framework specifically contemplates an after-the-fact avenue for redress in the case of consent forms that may appear valid but are not. Unless the process yields concrete

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Equity Act, Working Paper n. 202, at 1 (IGIER, Oct. 2001), available at <ftp://ftp.igier.uni-bocconi.it/wp/2001/202.pdf> (last visited Oct. 12, 2005). 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.

<sup>28</sup> 29 U.S.C. § 1055(c)(6).

<sup>29</sup> 68 F.3d 301(9<sup>th</sup> Cir. 1995).

<sup>30</sup> *Id.* at 304-305.

evidence of identity that is capable of independent authentication, however, this right to seek redress from the plan is empty. A “signature” that is accomplished by the push of a telephone button or the click of a mouse, whether done with the accompaniment of a PIN/password or not, will not later be capable of independent authentication that the spouse was indeed the one pushing the buttons, thereby denying the spouse any legally convincing way to prove her case and exercise her rights under § 1055(c)(6).

In summary, there are not one but two essential features that any system of electronic technology must have before it can be lawfully used to obtain spousal consent to waive a QJSA. The cornerstone to preventing problems before the fact is *physical presence*, and the prerequisite for meaningful access to a remedy for fraud after the fact is a handwritten signature or other concrete evidence of identity that is *capable of independent authentication*. The signatories do not foreclose possibility of using ET for spousal consent purposes, but the procedural requirements accompanying its use must effectively preserve these two touchstones.

### **As Currently Drafted, the Electronic Process Proposed Would Not Be Substantially Equivalent to the Nonelectronic Process Now in Place and Would Not Adequately Protect Spousal Pension Rights**

The proposed regulations in this rulemaking proceeding use the regime established under the Electronic Signatures in Global and National Commerce Act (E-SIGN),<sup>31</sup> in slightly modified form, to consolidate and coordinate all of its regulations concerning the use of ET to transmit and execute employee benefit plan communications, notices, elections, and consents (under the Service’s jurisdiction) that by law must be provided in writing.<sup>32</sup> E-SIGN provides that any signature or document required by law to be in writing cannot be denied legal effect solely because the signature or record is in electronic form.<sup>33</sup> By its terms, E-SIGN does not require anyone to use or accept electronic communications, nor does it alter any other legal requirements. But, it does provide that electronic versions of signatures and documents can satisfy legal requirements for signatures and written documents, as long as certain conditions are met and certain consumer protections are observed.<sup>34</sup> E-SIGN also gives federal agencies the authority to issue regulations or guidance interpreting E-SIGN’s requirements as they relate to the agency’s other rules.<sup>35</sup> However, one of the limitations on that authority is a requirement that the agency make a finding that the electronic methods selected are “substantially equivalent”<sup>36</sup> to the requirements imposed on their nonelectronic counterparts.

For the first time, the proposed regulations would also permit QJSA notices, elections, and consents to be accomplished by electronic means. The proposal provides “special rules for

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<sup>31</sup> The Electronic Signatures in Global and National Commerce Act, Pub. L. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. §§ 7001-7006, 7021, 7031) [hereinafter E-SIGN].

<sup>32</sup> Proposed ET Regulations, *supra* n. 1, at 40678.

<sup>33</sup> E-SIGN, *supra* n. 31, § 101(a)(1).

<sup>34</sup> *See id.* §§ 101(c)-(e), 104.

<sup>35</sup> *Id.* § 104(b)(1).

<sup>36</sup> *Id.* § 104(b)(2)(C)(ii)(I).

participant elections,”<sup>37</sup> and defines “participant elections” to include any consent or election made by a beneficiary.”<sup>38</sup> The requirements are:

- *Effective ability to access* – The individual “eligible to make the election” must be able to effectively access the electronic medium.
- *Authentication* – The electronic system used to deliver the election must be “reasonably designed” to preclude anyone else from making the election, e.g. through use of a PIN.
- *Opportunity to review* – The electronic system must provide a “reasonable opportunity” to review, confirm, modify, or rescind the election before it becomes effective.
- *Confirmation* – The person making the election must receive a paper or electronic confirmation of the action and effect of election within “a reasonable time.”
- *Physical presence* - The spouse’s signature must still be witnessed in the physical presence of the plan representative or notary.<sup>39</sup>

In the Explanation of Provisions that precedes the actual proposed rules, the Service makes a series of statements intended to correspond to and satisfy E-SIGN’s conditions on agency rulemaking. In its recitation, the Service makes a finding that there is a “substantial justification” for the proposed regulations and that “the requirements imposed on the use of electronic media under these regulations are substantially equivalent to those imposed on non-electronic records....”<sup>40</sup> However, the Service offers no evidence to support its finding. In fact, based on the signatories’ analysis, only a portion of the proposed process is substantially equivalent; a significant portion is not.

The preservation of the physical presence requirement creates a process that is substantially equivalent to the current nonelectronic process in its capacity to prevent coercion and fraud in the execution of spousal consent. The signatories commend the Service for recognizing the pivotal role played by the physical presence requirement and retaining it in its proposal. Physical presence deters and prevents unauthorized or otherwise invalid spousal consent forms from being filed — a requirement that prevents grief for both the spouse and the plan. Assuming that adequate explanations and disclosures are provided and that E-SIGN-like protections are observed for the spouse as well as the participant,<sup>41</sup> we see no reason why election and consent forms cannot be transmitted electronically to participants and spouses. As long as the form must still be signed in the physical presence of the witness, spousal protections before the fact are maintained and substantial equivalence is achieved. The Notice specifically asks whether there should be any exceptions to the physical presence requirement. Based on the still-limited availability of biometric technologies and the numerous questions not answered by the proposed regulations, it would be premature to permit or even anticipate permission to eliminate the physical presence requirement.

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<sup>37</sup> Proposed ET Regulations, *supra* note 1, § 1.401(a)—21(d).

<sup>38</sup> *Id.* § 1.401(a)—21(e)(2).

<sup>39</sup> *Id.* § 1.401(a)—21(d).

<sup>40</sup> Proposed ET Regulations, *supra* note 1, at 40679.

<sup>41</sup> But see questions raised in Other Concerns section regarding use of telephonic means for QJSA explanations or election/consent forms, and regarding insufficient separation of participant and spouse for consumer protection purposes.

However, as written, the proposed electronic process is not substantially equivalent to the current nonelectronic process in producing evidence of identity that is capable of independent authentication, thus enabling a spouse to challenge the validity of a fraudulent consent. There remain several shortcomings and unanswered questions about how ET would work in relation to spousal consent.

The proposed regulations appear to permit the use of electronic signatures by both spouses and notaries. There is no express mention of electronic signatures in the proposed regulations themselves, and there is no definition of “signature” that would clarify the point. However, the Explanation of Provisions section states that the “signature” of the spouse must be witnessed in the physical presence of notary or plan administrator, “regardless of whether the signature is provided on paper or through an electronic medium.”<sup>42</sup> Moreover, an allusion to electronic signatures appears in the request for comments on the reserved issue of whether there should be any exception to the physical presence requirement.<sup>43</sup>

If the intent is to permit electronic signatures, the signatories have substantial concerns. First, a common meaning of “electronic” or “digital” signatures is a symbol or action such as a digital certificate or use of a password that links the “signature” to a particular person or computer.<sup>44</sup> This definition of “signature” is wholly inadequate to the task of protecting spousal rights. It is far too likely that a participant and spouse share the same computer, and that the participant could intercept a password or access the spouse’s email account.

If what is contemplated is capturing some electronic version of the signer’s handwritten signature, some processes for obtaining and storing electronic signatures can be authenticated by a forensic examiner, and some cannot.<sup>45</sup> For instance, scanning and saving a signature as an image or faxing it “flattens the image,” such that it no longer contains “any of the nuances such as pen speed or stroke order that serve as evidence for authentication,” whereas some “signature pads and software ...allow expert human examination.”<sup>46</sup> The E-SIGN definition of an electronic signature focuses on technological attachment or association, and contains no requirement that the signature be captured in a way that authenticates the signer’s identity nor any requirement that the “signature” be capable of independent authentication. Thus, it cannot be relied upon for spousal consent purposes. The only spousal consent “signatures” — whether electronic or not — that should be given legal effect are ones that can be analyzed by a handwriting expert, verified by a fingerprint or retinal scan expert, etc. Otherwise, electronic signatures by spouses should be expressly prohibited.

Electronic notarization to effectuate spousal consent is specifically granted legal effect in the proposed regulations. This term is also undefined, but the proposed regulations seem to cross-

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<sup>42</sup> Proposed ET Regulations, *supra* note 1, at 40679.

<sup>43</sup> *Id.* at 40680.

<sup>44</sup> See generally Allen Samelson & Anthony Bedwell-Coll, E-Signature Trends for 2003 – Legal Trends, prepared for National E-Commerce Coordinating Council conference (Dec. 2002), available at <http://www.rjop.com/publish45.htm> (last visited Oct. 10, 2005).

<sup>45</sup> Paul Michael Zank, A Guide to Best and Worst Practices for Electronic Notary Journals 1 (Topaz Systems, 2004), available at <http://www.topazsystems.com/Information/notaryBP.pdf> (last visited Oct. 10, 2005).

<sup>46</sup> *Id.* at 2-3.



reference § 101(g) of E-SIGN, which states that any legal requirement that a signature or record be notarized may be satisfied if the electronic signature of the notary is “attached or logically associated with” that signature or record. There is no explanation of what this means in the QJSA waiver context. Is there any paper consent form in this process, and if so, what happens to it once it has been electronically notarized? In Example 3 of the proposed regulations, the spousal consent form just materializes, with no standards governing its delivery, and the notary sends an email to the plan that is “logically associated” with the spouse’s signature. What, exactly, is the evidence capable of authentication, and how and where would it be stored? The regulations are silent concerning precisely how the spouse receives the forms to review, how and in what form that document makes its way to a notary, what type or types of signatures are permitted and how the spouse affixes a signature to the document, and how any evidence capable of authentication gets generated and stored in this process.

Aside from the numerous questions left unanswered in the proposed regulations, electronic notarization is considered experimental.<sup>47</sup> It is not defined in federal law, even E-SIGN, and there are no nationally adopted standards,<sup>48</sup> which is perhaps why the proposed regulations reference state law.<sup>49</sup> Some states have adopted standards, but of course they differ from each other, and presumably ERISA would preempt them to the extent they conflict with the spousal protection requirements in federal law. It is extremely premature to rely on a process that is undefined in these proposed regulations or elsewhere.

The combination of the questions and concerns surrounding electronic signatures and those surrounding electronic notarizations are too substantial. Because the Service has not demonstrated that its proposal preserves evidence of identity that is capable of independent authentication, it has not provided any factual basis for a finding that electronic consent would be substantially equivalent to what is now in effect. To the contrary, the proposal would represent a major and unwarranted cutback in spousal rights. Certainly, spouses receive no discernible benefit that would make a “tradeoff” worthwhile. In fact, from spouses’ point of view, the proposed system succeeds only in getting rid of hard evidence — evidence without which a defrauded spouse has no capacity to challenge the validity of a forged consent form and reclaim any benefits legally due.

The defects in the proposed regulations could perhaps be cured. The signatories are experts in spousal pension rights, not experts in electronic technologies or biometrics. There *may* exist

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<sup>47</sup> Telephone Interview with Leo Nevada, ENJOA Technical Support Representative, National Notary Association (Oct. 5, 2005).

<sup>48</sup> The National Conference of Commissioners on Uniform State Laws adopted a Uniform Electronic Transactions Act that permits electronic notarization, but that Act does not define or set standards for electronic notarizations. The National Notary Association in 2002 published a Model Notary Act, Article III of which defines and describes the “Electronic Notary,” see Model Notary Act, . . . *available at* [http://www.nationalnotary.org/UserImages/Model\\_Notary\\_Act.pdf](http://www.nationalnotary.org/UserImages/Model_Notary_Act.pdf) (last visited Oct. 10, 2005), but there has been no widespread adoption of it, and in July 2005, the National Ass’n of Secretaries of State adopted a resolution stating that Secretaries of State are the “sole authority to establish standards enabling electronic notarizations.” National Ass’n of Secretaries of State, Electronic Notarization Resolution (adopted July 24, 2005), *available at* <http://www.nass.org/Electronic%20Notarization%20Resolution.pdf> (last visited Oct. 10, 2005).

<sup>49</sup> Proposed ET Regulations, *supra* note 1, § 1.401(a)—21(d)(6).

electronic technologies that pension plans can easily and economically utilize that would be capable of independent authentication and thus enable a defrauded spouse to prove whether an “electronic signature” was in fact that of the spouse. If so, such technologies should be required as a condition of utilizing ET. Moreover, the regulations should require the plan to store this evidence and make it available in the event a spouse requests it. But it is not enough to require a system be “reasonably designed” to preclude another person from making an election.<sup>50</sup> This framing is aimed at trying to prevent unauthorized election, but is too vague to be helpful even on that score. More important, it does not in any way address the need for solid evidence that permits a spouse to prove that a consent was invalid. The ET process needs to require something that is unique and cannot be impersonated: a handwritten signature, retinal scan, fingerprint, etc. *This* is the type of authentication that is required to deem ET substantially equivalent, and therefore this is the type of authentication that the Service should require in order to permit electronic technologies to be used to obtain spousal consent.

### **Other Concerns**

In addition to the fundamental defects identified above, the proposed regulations raise other concerns as well. Keeping in mind that the interests of participants and spouses are not necessarily in agreement regarding waivers of QJSAs, the proposal does not sufficiently distinguish between the consumer protections applicable to participants and those applicable to spouses. To the contrary, it submerges beneficiaries under the auspices of participants. As a result, it is unclear whether the spouse: receives separate notices, must separately consent in advance to the receipt of electronic communications, must separately demonstrate effective access, or receives separate confirmation of their action.<sup>51</sup>

A second concern is that the special rules for participant elections rely heavily on mandates for “reasonableness” — for authentication, the opportunity to review, and confirmation. All three of these stages could and should provide meaningful backstop protections, but as written, they fail to offer any real guidance regarding what would be reasonable.<sup>52</sup>

Third, the Service appears to be proposing that plans be permitted to require participants (and spouses?) to use ET if they have effective access,<sup>53</sup> and to charge fees for requests for paper documents, at least when the participant has already consented to ET. With regard to spousal consents and QJSA elections, participants and beneficiaries should *always* be permitted to request written documents, and they should not be charged fees for them, whether the request is made before or after consenting to receive electronic communications.

Finally, the proposal defines “electronic” as including voice recordings<sup>54</sup> and “electronic media” as including telephonic systems.<sup>55</sup> It is worth noting that the E-SIGN definitions of “electronic”

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<sup>50</sup> *Id.* § 1.401(a)—21(d)(3).

<sup>51</sup> In Example 3, a confirmation is sent to the participant but there is no mention of a confirmation to spouse.

<sup>52</sup> In its 2000 rulemaking, the Service may have decided that a “reasonably accessible” standard needed no further elaboration, 65 Fed. Reg. 6001, 6002 (Feb. 8, 2000), but such vagueness is inappropriate for something as important as spousal consent and QJSA elections.

<sup>53</sup> Proposed ET Regulations, *supra* note 1, at 40679.

<sup>54</sup> *Id.* § 1.401(a)—21(e)(4).

and “electronic signature” not only contain no references to either telephones or voice recordings, E-SIGN specifically states that voice recordings do not qualify as electronic records.<sup>56</sup> Neither a QJSA explanation nor a spousal consent form would ever be understandable over the phone — they are barely understandable in writing! Thus, if these systems remain in the definitions, there should be a specific prohibition on using them for participant election and spousal consent purposes. In addition, it would never be appropriate to permit telephonic systems to be used to obtain spousal consents.

## Conclusion

Electronic technology can provide convenience and economies to plans and to participants. But, convenience and economies should not take precedence over legal requirements and the underlying policies they are intended to achieve. Unless and until the Service can provide assurances that spouses will retain protections equal to those in current law, and specify the mechanics of how it will work, the Service should not extend ET to spousal consents and elections under § 417 of the Code. The signatory groups appreciate this opportunity to comment and the additional opportunity to provide comments at the public hearing, and look forward to working with the Service to determine whether, and if so how, ET should be permitted.

Sincerely,



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<sup>55</sup> *Id.* § 1.401(a)—21(e)(5).

<sup>56</sup> E-SIGN, *supra* n. 31, § 101(c)(6). *See also* Proposed ET Regulations, *supra* n. 1, at 40678, n. 6.