

Via electronic delivery

May 18, 2020

Attn: Megan G. Grumbine
Office of General Counsel
Federal Retirement Thrift Investment Board
77 K Street NE, Suite 1000
Washington, DC 20002

Re: Temporary Waiver of Notarization Requirement for Spousal Consent

Dear Ms. Grumbine:

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 — working across the issues that are central to the lives of women and girls. In the 1980s, PRC and NWLC worked together to secure the enactment of the Civil Service Retirement Spouse Equity Act of 1984, which provides critically important retirement benefits to widows and divorced spouses of federal employees. Since that time, PRC and NWLC have educated women about their spousal retirement rights and have actively engaged in policy debates to protect and improve those spousal rights. PRC and NWLC appreciate this opportunity to offer our comments on the Interim Rule issued by the Federal Retirement Thrift Investment Board (Board) on notarization of spousal consents.¹

The Interim Rule (Rule) temporarily waives the current requirement² that spousal consent forms for TSP withdrawals be signed by the spouse in the presence of a notary. The Rule indicates that the Board will consider comments on the duration of the time period that the Rule should remain in effect. These comments will address that point, but first we also wish to raise concerns about the Interim Rule itself, and its failure to consider alternatives to the notarization requirement that would better protect spouses during this temporary period.

Notarization Is a Key Component to Protecting Spousal Rights

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 out of government.³ 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 by the participant to a lump sum, which once

¹ Temporary Waiver of Notarization Requirement for Spousal Consent, 85 Fed. Reg. 21311 (Apr. 17, 2020), *available at* <https://www.federalregister.gov/documents/2020/04/17/2020-07734/temporary-waiver-of-notarization-requirement-for-spousal-consent> (hereinafter *Interim Rule*).

² 5 C.F.R. §§1650.61 and 1650.62.

³ The shared ownership of pensions and retirement savings account balances (and shared control over timing and form of payment) derives from the concept of marriage as an economic partnership: retirement funds accumulated during marriage are marital property of both spouses to be used to provide income in retirement.

taken is gone, would be irreversible and potentially devastating to the spouse. Spousal benefits are important to all surviving spouses but spousal retirement rights in general, and lifetime survivor annuities in particular, are especially critical to women's retirement security. Because women earn less than men, perform more unpaid caregiving, have less retirement wealth⁴ and tend to outlive men, they are more likely than men to rely on a spouse's retirement benefits in retirement.

The requirement for the consent to be signed in the presence of a notary helps to prevent spouses from being defrauded (forged signatures) because the notary checks identification to confirm identity and then witnesses the spouse signing the consent in the notary's presence. This precludes the consent from being signed by someone else, somewhere else. The notarization requirement also helps prevent consent from being coerced⁵ because the notary can witness the demeanor of the spouse and of the participant if present and refuse to notarize the document if duress is apparent.⁶ The risk of fraud and coercion are not trivial.

Recognizing this, the Board in issuing this Rule does not suggest that it believes that notarization is an unnecessary protection, or that signed consent should be dispensed with while people are sheltering in place. Rather, it stated that a major reason why it was promulgating the interim rule was because "TSP does not currently have the technological workflow to allow participants to submit remotely notarized forms electronically."⁷

Plainly, the stay-at-home orders and business closures associated with the COVID-19 crisis necessitate some accommodation to the notarization requirement until the public regains access to places like banks where notary services are available. But, there are other, alternative steps the Board could have included, but did not, that would help prevent fraud and coercion and better protect spouses. Our comments below articulate our concerns and our proposals for modifying the Rule.

Greater Protections Needed While Notarization Requirement Is Waived

1. Clarify that electronic signatures are not permitted - Without explanation, the preamble to the Rule contains a parenthetical reference to allowing electronic signatures,⁸ but the Rule itself doesn't say anything about electronic signatures being permitted. The Board should not allow electronic signatures, especially at the same time it is obviating the need for in-person notarization. Although the Board is temporarily lifting the notary requirement, the parenthetical suggestion that electronic signatures will suffice should be deleted, and the Board should clarify that it still requires a handwritten signature on the consent form so that it can be authenticated after-the-fact in the event there is later any question of fraud. This

⁴ 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/>.

⁵ Note that the social isolation and financial stress caused by COVID-19 have exacerbated the risk of domestic violence. Rachel Bucchino, "Domestic violence cases surge amid stay-at-home orders," *The Hill* (Apr. 13, 2020), available at <https://thehill.com/homenews/news/492506-domestic-violence-cases-surge-amid-stay-at-home-orders>. See generally, A. Fernandes-Alcantara & L. Sacco, Cong. Research Serv., IN11323, *Domestic Violence in the Context of COVID-19*, at 1-2 (Apr. 10, 2020), available at <https://www.everycrsreport.com/reports/IN11323.html>; K. Wells & T. Klosowski, "Domestic Abusers Can Control Your Devices. Here's How to Fight Back," *N.Y. Times (Wirecutter)*, Apr. 6, 2020, available at <https://www.nytimes.com/2020/04/06/smarter-living/wirecutter/domestic-abusers-can-control-your-devices-heres-how-to-fight-back.html>.

⁶ Nat'l Notary Ass'n, *The Notary Public Code of Professional Responsibility* III-B-2, at 10 (July 2009), available at https://www.nationalnotary.org/file%20library/nna/reference-library/notary_code.pdf.

⁷ *Interim Rule*, *supra* n.1.

⁸ *Id.*, at 21311.

can be accomplished simply by reference to the procedural changes the Board just recently made: married participants already must “print the [TSP-99] form, gather the necessary signatures, have the form notarized, and then send it to the TSP.”⁹

2. Limit withdrawals or guarantee surviving spouse annuity - The Rule makes no attempt to compensate for the loss in protections that waiving notarization creates by adding some alternative measures that are doable during this temporary shutdown. For instance, the Board could limit the amount a married participant could withdraw without notarized consent, e.g., up to 10% of the TSP balance. The participant could withdraw more or the rest of the balance later, with notarized consent, after stay-at-home orders have been lifted. Alternatively, the Board could allow the participant to withdraw an amount that would leave the spouse with the same survivor annuity amount she or he would have collected absent the withdrawal, with the TSP preserving and guaranteeing this 50% benefit for the spouse. The Pension Rights Center and the National Women’s Law Center recently made similar recommendations to the IRS and Treasury Department in response to industry letters seeking emergency waivers of notarized spousal consent for lump sum cash-outs of private sector defined benefit pension plan benefits.¹⁰
3. Strengthen certainty of penalties for participant fraud - Requiring notarization is no guarantee that fraud will not occur, but at least it makes the fraud more difficult to complete. Without it, TSP processing of withdrawal applications under the Interim Rule will essentially be operating on the honor system. Under our current economic circumstances, a financially strapped participant (particularly if the marriage is under stress) has an even greater incentive not to comply with the spousal consent requirement if he or she believes that the other spouse will not voluntarily consent to the withdrawal. This notary-less window also permits participants who are contemplating divorce to drain their accounts and put the funds beyond the reach of the soon-to-be former spouse, or a court. It is not sufficient simply to “remind” 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.”¹¹ Nor is it sufficient to tell a defrauded spouse that she or he could raise the issue in civil court, such as in a divorce. The Board should strengthen the certainty of penalties in the event of fraud or coercion. Specifically, the Rule should cite its own regulation, which provides that

the Board *will* investigate allegations of fraud or forgery in a participant’s withdrawal request. If the Board finds evidence ... [of fraud], the Board *will* refer the case to the Department of Justice for criminal prosecution and, in the case of a participant who is still employed, to the Inspector General or other appropriate authority in the participant’s employing agency for administrative action.¹²

⁹ Tee Ramos, Director, Office of Participant Services, Federal Retirement Thrift Investment Board, “New Options and Processes for Withdrawal Requests for Separated and Beneficiary Participants,” *TSP Bulletin for Agency/Service TSP Representatives*, Bulletin 19-6 (Sept. 15, 2019), available at <https://www.tsp.gov/PDF/bulletins/19-06.html>.

¹⁰ See PRC and National Women’s Law Center Letter to Department of Treasury-IRS on Spousal Consent during the COVID-19 Emergency (Apr. 14, 2020), available at <http://www.pensionrights.org/sites/default/files/docs/prc-nwlc letter on emergency spousal consent 4-14-20 f.pdf>; PRC and National Women’s Law Center Letter to Department of Treasury-IRS on Spousal Consent during the COVID-19 Emergency (May 1, 2020), available at <http://www.pensionrights.org/sites/default/files/docs/prc-nwlc spousal consent letter to treasury-irs 5-1-201.pdf>.

¹¹ *Interim Rule*, *supra* n.1, at 21311.

¹² 5 C.F.R. §1650.4 (emphasis added).


The Board should make it clear that it *will* take all of the above steps, and any other actions within its authority, in the event a participant commits fraud during this the period in which the Interim Rule is in effect. The Board should also take responsibility for handling fraud reports and informing spouses how and whom to contact *at the Board* in the event of fraud.

Duration of Waiver Should Be Very Limited

Many states have slowly begun to lift their stay-at-home orders and to reopen businesses. Still, many people, especially older adults and retirees who may be more susceptible to the virus, do not yet feel comfortable patronizing businesses. There is no national stay-at-home order, although the President did declare a National Emergency on March 13, 2020.¹³ The Interim Rule has already been “on the books” for one month. We urge the Board to provide that the Rule should automatically sunset within 6 months from the date it was published, or when the President announces that the National Emergency has ended, whichever is sooner. Should most state-imposed stay-at-home orders extend beyond the next 5 months, the Board has the option to extend the Interim Rule, e.g., for another three months.

In conclusion, the Pension Rights Center and National Women’s Law Center urge the Federal Retirement Thrift Investment Board to modify its Interim Rule to include alternatives to notarization that would help fill the gap and protect spousal benefits, and to narrowly limit the duration of the rule’s applicability.

Sincerely,



Karen W. Ferguson
Director
Pension Rights Center



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

Cc: Carol Weiser, Benefits Tax Counsel, U.S. Department of the Treasury
Victoria Judson, Associate Chief Counsel, Internal Revenue Service

¹³ Proclamation No. 9994, 85 Fed. Reg. 15337 (2020), Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, issued March 13, 2020, *available at* <https://www.federalregister.gov/documents/2020/03/18/2020-05794/declaring-a-national-emergency-concerning-the-novel-coronavirus-disease-covid-19-outbreak>.