

December 9, 2022

Via Electronic Delivery

Rachel Leiser Levy, Associate Chief Counsel (EEE)
Internal Revenue Service
1500 Pennsylvania Ave., NW
Washington D.C. 20220

RE: Physical Presence Requirement for Spousal Consents (IRS Notice 2022-27)

Dear Ms. Levy:

The undersigned retiree, women's and consumer organizations strongly urge the Internal Revenue Service (Service) to protect spousal retirement rights – rights that disproportionately affect women – by allowing its temporary guidance to expire and thereby restore its longstanding requirement that a spouse's surrender of rights to retirement benefits must occur in the *physical presence* of a notary or plan administrator. By having to sign the pivotal spousal consent form in front of a notary or a plan administrator, the gravity of this irrevocable decision is reinforced, and the physical presence of a third party helps to ensure that the consent is executed without fraud, coercion, or duress.

It was understandable for the Service to have made a temporary exception to this longstanding rule in the first months of the pandemic – when notaries were inaccessible because of business shutdowns and physical presence was ill-advised due to social distancing. However, the Service has now issued several temporary extensions – the latest of which will expire at the end of this year. The extraordinary circumstances that prompted the initial pandemic-driven exception have long since passed. **The last extension (Notice 2022-27) should be allowed to expire, there should be no more extensions, and the physical presence requirement should once again apply and remain in effect.**

Congress adopted strong measures for spousal consent waivers in the Retirement Equity Act because it recognized these elections are different from all other retirement choices. By law, retirement plan participants who are married are required to take a smaller pension in order to pay for a lifetime share for the surviving spouse, and must also leave their workplace retirement savings account to their surviving spouse, *unless the spouse consents to give up these rights*. Thus, on the issue of spousal consent, there is a direct, financial conflict of interest between people who are intimates in the same household. Having to physically go to a notary or plan official not only impresses upon the nonparticipant-spouse the very serious, irrevocable, financial import of the election, but having an in-person witness also helps prevent and deter fraud and coercion by the participant and protect the rights of the nonparticipant-spouse.

Assertions by industry to the contrary, there is no evidence that remote online notarization is equally protective of spouses as the requirement to sign away rights in the physical presence of a notary. Often there is a decades-long time lag between when consent is signed and fraud comes to light, so the idea that remote online notarization can be said to be effective cannot be determined in the few years during the temporary waivers. Fraud is a real concern in spousal waivers of retirement benefits. 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.

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 wealth and tend to outlive men, making it more likely that they will rely on a spouse's retirement benefits in retirement. Going to a notary in

person is a straightforward, nonburdensome transaction, especially considering the enormous financial interests at stake for widows that Congress sought to secure with strong spousal protections. In light of gender disparities in retirement savings and income, the Service should err on the side of more protection for spouses, not less. Letting the temporary waiver of the physical presence rule expire would simply restore the status quo that existed prior to the pandemic. Unless and until the Service is prepared to offer a new regulatory proposal that is designed to actually strengthen rather than weaken spousal protections, it should maintain the current requirement that spousal consents be executed in the physical presence of notaries or plan administrators.

Sincerely,

Pension Rights Center
National Women's Law Center
AARP
Women's Institute for a Secure Retirement (WISER)

Cc: Pamela Kinard, Special Counsel, Office of the Associate Chief Counsel
Eric Slack, Director, Employee Plans
Edward Killen, Commissioner, TE/GE
Carol Weiser, Benefits Tax Counsel