



AMERICAN BENEFITS COUNCIL

April 20, 2020

Carol Weiser
Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Catherine Jones
Acting Director
Employee Plans Division
Internal Revenue Service
999 N. Capitol Street, NE
Washington, DC 20002

Victoria Judson
Associate Chief Counsel
Employee Benefits, Exempt Organizations
& Employment Taxes
Internal Revenue Service
1111 Constitution Avenue, NW
4302 IR
Washington, DC 20224

Dear Carol, Vicki, and Cathy:

We are writing to highlight an issue of increasing importance to families across the country. The regulatory rule requiring spousal consent to be witnessed in the physical presence of a plan representative or notary is clearly not suited to the current environment where requiring such physical presence can jeopardize the health of Americans across the country. **In fact, as discussed further below, for safety reasons, the Federal Thrift Savings Plan (TSP) has just waived the requirement that spousal consent be notarized at all. Private-sector families deserve safety protections just like federal workers.** Accordingly, we ask you to consider providing for private sector families' protections, as the TSP has done for federal workers.

As you know, many families have lost some or all of their income due to layoffs, pay reductions, hour reductions, and business closures. In some cases, the only source of funds that families have to pay for the basics of life is their retirement savings. Although we believe that retirement savings are for retirement, families who cannot pay daily bills have an overriding problem that must be addressed. Many of these families are asking for a lump sum distribution of their pension benefits. **In some cases, families who may desperately need their retirement benefits are being denied those**

benefits because they will not jeopardize their health by seeing a notary or plan representative in person.

Some are suggesting that unless a family jeopardizes its health by seeing a notary or plan representative in person, lump sum distributions to families should be limited to 10% of the total benefits the family is entitled to. It is hard to imagine trying to explain to a family in need why they need to jeopardize their health in order to obtain all the money that is owed to them and that they may desperately need.

As you know, the regulations require spousal consents to be witnessed in the physical presence of a plan representative or notary.¹ But the regulations also provide that non-regulatory guidance may permit the use of electronic substitutes for the physical presence requirement, provided that safeguards are in place. Such non-regulatory guidance is urgently needed now.

States are recognizing this problem and are adopting updated procedures to permit electronic notarization, such as through videoconferencing with clear and strong safeguards.² We urge Treasury and the IRS to do the same thing as soon as possible. People need their savings, and no rule should require them to jeopardize their health to get those savings.

¹ Treas. Reg. sec. 1.401(a)-21(d) provides:

6) Participant elections, **including spousal consents**, that are required to be witnessed by a plan representative or a notary public.

- (i) **In general.** In the case of a participant election which is required to be witnessed by a plan representative or a notary public (such as a spousal consent under section 417), the signature of the individual making the participant election is **witnessed in the physical presence of a plan representative or a notary public.**
- (ii) **Electronic notarization permitted.** If the requirements of paragraph (d)(6)(i) of this section are satisfied, an electronic notarization acknowledging a signature (in accordance with section 101(g) of E-SIGN and State law applicable to notary publics) will not be denied legal effect if the signature of the individual is **witnessed in the physical presence of a notary public.**
- (iii) **Delegation to Commissioner.** In guidance published in the Internal Revenue Bulletin, **the Commissioner may provide that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement under paragraph (d)(6)(i) of this section**, but only if those procedures with respect to the electronic system provide the same safeguards for participant elections as are provided through the physical presence requirement. See §601.601(d)(2)(ii)(b) of this chapter

² See, e.g., <https://www.governor.ny.gov/news/no-2027-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>;
http://sbog.informz.net/sbog/data/images/04.09.20.01_Notaries%20and%20Witnesses.pdf

In News Release IR-2020-68, issued April 9, 2020, “[t]he Internal Revenue Service . . . reminds taxpayers and tax professionals to use electronic options to support social distancing and speed the processing of tax returns, refunds and payments.” It would be strangely inconsistent for the government to (1) encourage the use of electronic systems to support social distancing, on the one hand, while at the same time (2) mandate no social distancing in order for plan participants to obtain desperately needed money.

Finally, and most powerfully, as noted, the Federal Retirement Thrift Investment Board just waived the notarization requirement entirely, citing both the need for safety and the need for pension distributions:

The coronavirus pandemic has disrupted day-to-day life in an unprecedented way. These disruptions, which include mandatory business and school closures, stay-at-home/shelter-in place orders, and quarantines have made it difficult and unsafe to have forms notarized in-person. . . .

Under these conditions, the regulation requiring spousal consent to be notarized has become an extraordinary hurdle for married TSP participants who need to request a withdrawal during this difficult time. Therefore, the Executive Director has determined that is necessary to temporarily waive the notarization requirement for spousal consent.

Private-sector families need to be protected, just as federal workers do. We are all in this together.

Thank you for your consideration of this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson", written in a cursive style.

Jan Jacobson
Senior Counsel, Retirement Policy

cc: Kyle Brown
William Evans
Lauson Green
Linda Marshall
Neil Sandhu
Michael Spaid
Stephen Tackney
Laura Warshawsky
Harlan Weller
David Ziegler
Carol Zimmerman