



Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655, U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

November 18, 2019

RE: RIN 1210-AB90 (Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA)

Consumer Action¹ is working on several fronts to push back against corporate and government policies that switch the default delivery of financial statements, invoices and notices to electronic delivery. We are simply not at the point at which this is appropriate.

Paper delivery should be the default—especially for people who have not opted into electronic delivery. In January 2019, more than 2,600 people responded to our online survey² asking about their delivery preferences. The message was clear: Consumers overwhelmingly prefer to receive bills and statements on paper rather than electronically! For some older, disabled or lower-income consumers, paper documents are not just an option, they're a necessity. Those who are not tech-savvy, have difficulty using a computer or have no internet access at home find paper statements essential. There is evidence as well that paper-based information is better for comprehension³.

Because we believe so strongly that it is wrong to willy-nilly switch existing customers still receiving paper disclosures, invoices and notices over to electronic deliver, we have become members of two coalitions (Coalitions for Paper Options⁴ and Keep Me Posted⁵) working to oppose defaults that push taxpayers and existing customers into a delivery method they do not prefer.

We are writing today to oppose proposed regulation RIN 1210-AB90 (Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA), which would undermine the retirement security of millions of workers and retirees who depend on their paper retirement disclosures to enable them to enforce their rights. Making electronic delivery the default means of delivering retirement information would effectively weaken consumer protections for participants and beneficiaries, the very people the disclosures are intended to protect.

¹ Consumer Action empowers consumers nationwide to financially prosper through education and advocacy (<https://www.consumer-action.org>).

² Consumers prefer a paper trail: Consumer Action survey (<https://www.consumer-action.org/press/articles/consumers-prefer-paper-trail>)

³ "The Reading Brain in the Digital Age: The Science of Paper versus Screens," Scientific American, (April 11, 2013).

⁴ The Coalition for Paper Options is fighting government proposals to remove access to paper information (<https://www.paperoptions.org>).

⁵ Keep Me Posted North America is pressing companies to provide default access to bills, medical records and other important, confidential communications in paper format (<https://keepmepostedna.org>).

Trying to push people prematurely into electronic delivery and asking them to take the time and trouble to opt back into paper, when their wishes are already clear, is a foolish errand that will benefit mostly for-profit companies who must retain paper for customers who wish it as a cost of doing business. If this is a “problem” (which we do not believe it is) then it is a problem with an expiration date, which will disappear over time as everyone gains access to the internet and becomes more comfortable with the burden placed on electronic customers: downloading, storing, paying to print at home, loss of access to older records, etc. For now, there is absolutely no reason nor benefit to forcing the hand of recipients of paper retirement disclosures! And, we find it high-handed and paternalistic (i.e., we know what’s better for you than you do yourself).

ERISA requires administrators of retirement plans to furnish several important disclosures to workers, retirees and spouses so that they know their rights, know what benefits they’re entitled to, are aware of the fees they’re being charged, and can ensure that the plan is being well managed. These disclosures are critical to helping workers plan for and achieve retirement security.

Currently, longstanding regulations require plans to *furnish* disclosures and take steps to ensure *actual receipt* of the disclosure by participants and beneficiaries. Generally, plans must send paper disclosures by mail as the default means of delivery, but employers can send electronic disclosures to their employees who work with computers, or they can offer consumers the choice to *opt in* to electronic delivery. This system of delivery has worked well to ensure that consumers automatically receive paper—the more reliable method of delivery—and those who prefer to receive information electronically may do so.

But the new proposed regulation would institute a new disclosure delivery system called “notice and access,” reversing the system from one of actual receipt of the default of paper disclosures sent by mail to a default system relying on electronic notice—not a full electronic version of the disclosure. They only would need to electronically notify (by email, text, phone, etc.) the participant that a disclosure document is available on a website, then the burden would entirely fall on the participant or beneficiary to take the many steps involved in finding it, downloading it, filing it, and printing it out. The proposal also fails to provide adequate consumer protections, regardless of which delivery method is used.

The proposed rule contemplates that any deficiencies in its proposal are cured, or at least neutralized, by its provisions enabling participants and beneficiaries to receive one initial paper disclosure informing them of their ability to “globally” opt out of all electronic disclosures. They can also request a paper version of specific documents. But there are no requirements for how the opt-out process will work, or whether the significance of the failure to opt out must be adequately explained. Opting out to get paper should be easy; those who prefer paper should not be required to write a letter requesting paper.

The proposed regulation for “Notice and Access” has virtually no protections to ensure that individuals actually receive these disclosures:

- **The proposed regulation allows notice by any technology:** There is no requirement to use email. Plans would be allowed to notify consumers of the availability of a disclosure with a text message, or a robocall, which are not verifiable or easily preserved.
- **Made-up email addresses:** The proposed rule would allow plan administrators to assign or even make up email addresses for participants and beneficiaries.
- **No actual receipt required:** There is no requirement whatsoever that the administrator confirm that an email notice was actually opened by the recipient. Thus, if the email goes to a spam folder, or gets buried or misfiled, the recipient never actually receives the notice or the disclosure. Nor is there any requirement that the recipient actually have accessed the

document. This is despite the fact that both actions are easily determined by the plan administrator with this technology.

- **Obscure website information:** The proposed rule could force beneficiaries to wade through marketing communications or several webpages in order to find the disclosures.
- **Spousal rights not adequately protected:** The proposed rule makes no exception for important action documents that are currently required to be in writing, such as notices to spouses of their right to a survivor annuity and that their consent is required to waive that right.

Finally, this new proposed regulation is a giveaway to the financial services industry and shifts costs on to consumers. According to the regulatory analysis, this new framework will save plan administrators \$2.4 billion over 10 years. Plan sponsors and administrators have a fiduciary duty to make decisions for the benefit of the participants and beneficiaries. Yet, the proposal imposes absolutely no requirement for plans to pass on those savings by adding to the pension fund or by reducing 401(k) fees. Firms will simply pocket the windfall while retirees are required to pay for internet access and the hardware, software and supplies needed to access disclosures. This is deeply unfair.

This proposal comes in response to a decades-long lobbying effort of the financial services industry, without any serious attempt to grapple with the new framework's admitted adverse impact, and without any evidentiary support or reasonable explanation of how participants and beneficiaries will be at least as well-protected as the current, well-balanced framework.

Unsubstantiated assertions that electronic delivery of information will "make these disclosures more understandable and useful for participants and beneficiaries"⁶ do not justify reversing the status quo. Consumers who are comfortable with technology have already accepted that electronic disclosures are useful to them personally, but a majority who have stuck with paper mailings apparently do not agree.

This proposal should be withdrawn to ensure actual receipt of disclosures and adequate consumer protections. We simply cannot understand why the Employee Benefits Security Administration would issue a proposed rule that benefits firms rather than employees and retirees.

Sincerely,



Linda Sherry
Director, National Priorities

⁶ Unified Regulatory Agenda, DOL/EBSA, "Improving Effectiveness of and Reducing the Cost of Furnishing Required Notices and Disclosures," RIN 1210-AB90 (Spring 2019).