



November 22, 2019

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

To Whom It May Concern:

The National Employment Law Project (NELP) writes to respond to the Department of Labor's (USDOL) request for comments on the proposed electronic disclosure requirements for employee pension benefit plans under ERISA.

NELP is a non-profit research and policy organization that for more than 50 years has sought to ensure that America upholds the promise of opportunity and economic security for all its workers. NELP's constituents include the millions of workers and their families in the U.S. who invest their savings for retirement and retirees who rely upon those retirement savings to make ends meet.

We oppose the proposed regulation on Default Electronic Disclosure, which would allow employee benefit plans to default millions of workers and retirees into an electronic disclosure system without their consent. This will undermine the retirement security of millions of workers and retirees who depend on paper retirement disclosures to enable them to enforce their rights. While the number of people who use the internet is increasing, it is not as universal as living and working in our nation's capitol would make it seem. Furthermore, increased internet usage does not mean that a sufficient percentage of workers and retirees prefer to receive disclosures electronically to justify the proposed change. Further, this proposal is devoid of evidence that electronic disclosure represents an effective system for consumer disclosures and should be default method for making them. We believe that current law reflects this reality in a reasonable manner, and that this rule is unhelpful, counterproductive and should be withdrawn.

NELP has a strong focus on the rights of workers who currently receive paper disclosures (unless they opt for electronic disclosure) because they are unlikely to be working with computers at work, and in fact, these professions play a huge role in the future of work. For example, underpaid health care workers like home care workers are one of the fastest segments of the workforce. While NELP is trying to think about how to help workers in an increasingly fractured workplace have real retirement security, these regulations directly contravene our efforts. Making a new form of electronic delivery the default means of delivering retirement information would not strengthen and will

effectively weaken consumer protections for millions of participants and beneficiaries, the very people whom the disclosures are intended to protect. At a time that we ought to be concentrating all of our efforts on making pensions easier to access and more understandable, this proposal would obscure information about what is often workers' biggest asset.

ERISA requires administrators of retirement plans to furnish several understandable, 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 watchdog that the plan is being managed to protect their interests. These disclosures are critical to helping workers plan for and achieve retirement security. Currently, rules require plans to *furnish* disclosures and take steps to ensure *actual receipt* of the disclosure by participants and beneficiaries.

This rule broadly erodes employer responsibility to make sure that workers receive these required notices. Generally plans must send paper disclosures by mail as the default means of delivery to participants if they do not regularly work at computers, but can offer consumers the choice to *opt in* to electronic delivery. While this works well for electronically adept users who work with computers all day, a majority of consumers automatically receive paper – the more reliable method of delivery.

Furthermore, according to the Federal Communications Commission's 2019 Broadband Deployment Report, 21.3 million Americans lack access to broadband internet, and emphasizes that mobile services is not a substitute for broadband. While broadband access is rapidly expanding, 26 percent of rural Americans still lack access, as well as 31 percent of those living in tribal areas. This regulation is also out of touch with America's seniors, who are arguably the most critical audience for these disclosures. A 2017 Pew Research Center report found that 67 percent of seniors report to regularly access the internet, while only 51 percent have broadband at home. As is to be expected, the older the seniors are, the less likely they are to use the internet.

In addition, even if workers and retirees have increased access to the internet, this proposal is devoid of evidence that they prefer to receive required disclosures electronically. Nor is there any evidence in this proposal that workers and retirees would be more likely to read and/or better understand disclosures that are provided electronically. This lack of evidence underscores how unjustified and unnecessary. The new proposed regulation would institute a new disclosure delivery system called "notice and access" that reverses the system from one of actual receipt of the default of paper disclosures sent by mail to one in which workers now bear the responsibility of finding the notice of the documents, and then the documents themselves, in what may be an unmanageably labyrinthine system. Under this rule, plans would not even need to send an electronic document to the consumer. They would only need to electronically notify the participant that a document is available on a website, then the burden would entirely fall on the participant or beneficiary to find it. The proposal also fails to provide adequate consumer protections, regardless of which delivery method is used.

That also means that workers who have not downloaded information from the site designated by the plan sponsor may also not be able to access older documents. The rule further claims that these harms are ameliorated by its provisions allowing participants and beneficiaries to receive a one-time initial paper disclosure informing them of their ability to “globally” opt out of all electronic disclosures by making a telephone call. They can also request a paper version of specific documents. But there are no requirements for how the opt-out process will work.

The proposed regulation will be harmful for its “Notice and Access” provision has next to 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 could to notify participants and beneficiaries of the availability of a disclosure with a text message or email, neither of which are not verifiable or easily preserved. Further, for those at the lower end of the income scale, cellular phone numbers may change frequently.
- **Email addresses can be made up:** The proposed rule would allow plan administrators to assign or even make up email addresses to send notices to.
- **No actual receipt required:** While the technology is readily available to ensure receipt of notification, there is no requirement that the administrator confirm that an email notice was actually received and opened by the recipient. This kind of minimal requirement would represent very little burden to plan administrators, but would provide a real improvement in ensuring access.
- **The ability to get information on websites is complicated and can create disincentives to participation:** Retirement plans are already hard enough for workers to understand. Consumers should not be forced to wade through marketing communications or several webpages in order to find the disclosures. This proposed rule fails to properly ensure simplicity or directness of access.
- **Spousal rights not adequately protected:** The proposed rule applies to all 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. Spousal rights to significant benefits could easily be lost to a disused e-mail address.

The financial services industry benefits both from participant and beneficiary disengagement as well as the physical cost of notifying workers about their pensions. According to the regulatory analysis, this new framework will save plans \$2.4 billion over 10 years. Plan sponsors and administrators have a fiduciary duty to make decisions solely for the benefit of the participants and beneficiaries. Yet, this proposed regulation imposes absolutely no requirement for plans to pass on those savings e.g., by adding to the pension fund corpus, or by reducing 401(k) fees the pension fund 401(k) accounts. It simply shifts costs to current and future retirees by requiring them to have purchased and maintain internet access and the hardware, software, supplies needed to access disclosures. That is deeply unfair.

This proposal is being proposed without any serious attempt to address in any way how to mitigate adverse impact this will have on workers most in need of information, 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. The proposed rule's framework and the specifics of the proposal impose all of the disadvantages of technology, but confer none of its advantages.

Finally, while the proposal provides for an effective date 60 days after the date of the publication of the final rule, it provides for an applicability date as the first day of the first calendar year following the date of publication of the final rule. That must be changed if this rule is published as final before the end of 2019 as the applicability date will occur before the effective date.

This proposal should be withdrawn, or at least the agency should demonstrate its consideration of real input from lower income workers. If it is the case that it is difficult to solicit input from those affected, perhaps that same consideration should be given to their ability to meaningfully interact with electronic notifications.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads "Christine L. Owen".

Executive Director
National Employment Law Project