



Consumer Federation of America

November 22, 2019

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

Re: Electronic Disclosure by Employee Benefit Plans, RIN 1210-AB90

Ladies and Gentlemen:

We are writing on behalf of the Consumer Federation of America (CFA)¹ to express our opposition to the proposed new safe harbor that would allow employee benefit plans to default a huge swath of retirement savers into an entirely electronic disclosure system without their consent.² While we have long touted the potential of electronic delivery (e-delivery) of investor disclosures to enhance the quality and timeliness of disclosures,³ and believe that in the future investors will increasingly prefer -- and affirmatively choose -- to receive and consume their disclosures electronically, the fact remains that we simply have not yet reached the point in this country where a sufficient percentage of investors prefer to receive disclosures electronically to justify a default to e-delivery. While we feel certain that day will eventually arrive, a premature move to electronic delivery based on implied consent ensures that fewer investors will receive and review the important disclosures these documents are intended to provide.

The Department has failed to make the case that this proposal is needed or warranted. First, the Department has failed to provide any evidence to support the argument that retirement savers prefer to receive ERISA employee benefit plan regulatory disclosures electronically. Nor has it provided any evidence that this proposal would increase the likelihood that investors would read and better understand the regulatory disclosures that are provided to them. Rather, there is a very real risk that the proposed shifting of the default delivery system from paper to electronic will make it less likely that certain retirement savers read important plan disclosures and, as a result, these investors could make less informed decisions. In short, the Department is proposing to force a huge swath of retirement savers into a disclosure system that they didn't ask for and which may not work well for them.

¹ Consumer Federation of America is a nonprofit association of more than 250 national, state, and local consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.

² Proposed Rule and Request for Information, Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 84 Federal Register 56894, October 23, 2019, <http://bit.ly/2XEMBkc>.

³ See, e.g., Barbara Roper, *Can the Internet Transform Disclosures for the Better?*, Consumer Federation of America, January 2014 <http://bit.ly/1CwEbJS>.

Moreover, specific elements of the proposal are likely to harm a significant number of retirement savers. The proposal covers an inappropriately broad selection of savers and plan disclosure documents, allows for far fewer notices of plan disclosures to be sent to savers, and doesn't adequately ensure that any meaningful information about the disclosures' content, relevance, or importance will be conveyed in those notices.

Before the Department allows administrators to shift the default delivery mechanism from paper to a notice and access e-delivery regime, the Department should provide compelling evidence that there is widespread investor demand for such a regime, that investors are more likely to consume electronic disclosures than paper disclosures, and that the industry has shown a willingness to innovate by using technology to enhance the quality and timeliness of electronic disclosures. Having failed to do any of those things, the Department should withdraw this proposal.

I. The Department has failed to provide a proper justification for this proposal.

The Department's proposal to shift the default disclosure delivery system from paper to electronic is based on flawed arguments. First, the proposal is justified on the basis that there has been a significant expansion in access to and use of the internet and other electronic media. This is unquestionably true. But the Department uses this data to inappropriately conclude that this has increased the number of individuals for whom electronic delivery of ERISA disclosures is appropriate or preferred. First, it ignores the fact that within certain groups, particularly older, poorer, rural, and minority populations, access to and use of the internet continues to lag. Second, it ignores the fact that many individuals access the internet on their phones, which may be ill-suited for review of disclosures.

Furthermore, the fact that many retirement savers have access to the internet tells us nothing about whether they prefer to receive disclosures electronically rather than via paper. In fact, the evidence suggests that a significant percentage of investors prefer to receive disclosures through the mail or in person, not electronically through a notice and access model.

For example, 36% of investors still prefer to receive paper disclosures physically mailed to them and another 17% prefer to receive disclosures through in-person meetings with a broker or advisor, not through email or online access, according to the most recent FINRA Foundation survey data.⁴ In contrast, a small minority of only 9% prefer to receive documents that they access on the internet, not via email. While there does appear to be a growing willingness to receive documents by email,⁵ that's not what this proposal does. Importantly, this survey focused on investors with non-retirement accounts. It's entirely possible that the responses would be materially different for those with ERISA plan accounts, particularly because the option to receive disclosures through in-person meetings with a broker or advisor would not be available in this context and could materially affect respondents' preferences. At the very least, the Department has an obligation to find the answer to that question before proposing such a radical shift in the delivery requirements.

⁴ FINRA Investor Education Foundation, Preliminary Results from the 2018 National Financial Capability Study, *forthcoming*.

⁵ *Id.*, finding that 33% of those surveyed prefer to receive investor disclosure documents delivered by email.

While we clearly recognize that the percentage of the population that prefers to receive their disclosures electronically is growing and that ultimately we will get to a point where the clear preference is to receive and consume disclosures electronically, the data show that we are not there yet. Indeed, the evidence that the Department itself has cited in the proposal underscores that conclusion. For example, the Department cites to evidence that “a very small fraction” (3%) of Thrift Savings Plan (TSP) participants have opted into a fully electronic disclosure delivery system. Given that TSP participants have had the opportunity to consume their disclosure documents both electronically (the default for quarterly statements) and through the mail (the default for annual statements), that suggests TSP participants are not eager to make the transition to electronic only.⁶

Moreover, the Department makes no attempt to understand or analyze whether and to what extent the existing mechanism for providing electronic disclosures already tracks savers’ abilities to access electronic information and their preferences about how they receive disclosures. Under current rules, two categories of workers are permitted to receive electronic disclosures. First, “wired at work” employees, those who use computers as an integral part of their job duties, can be defaulted into an electronic delivery disclosure system. Second, those who affirmatively consent to receive documents electronically can opt into an electronic disclosure system. The Department’s economic analysis reflects an assumption that slightly less than half of participants currently receive covered documents by mail, which implies that slightly more than half of participants already receive covered documents electronically. Yet the Department never considers whether this breakdown reflects the number of retirement savers for whom it is appropriate and who desire to receive electronic disclosures. In other words, the Department never contemplates whether existing e-delivery policies already track savers’ preferences.⁷ The fact that so many plan participants don’t choose e-delivery, when they have that option available, may suggest that they do not prefer e-delivery.

If, for example, the percentage of savers in an e-delivery system closely tracks the number of savers for whom e-delivery is appropriate and desired, then it would appear that the existing approach is working well and expanding beyond that pool to include those who are not “wired at work” or who have not affirmatively consented to receive electronic disclosures would effectively push a huge swath of savers into a system that won’t work for them. Such a result would be inappropriate and unreasonable.

In addition, the Department has failed to provide any analysis of what the practical effect that this proposal would have on savers. Specifically, it fails to consider whether the shift in default from paper to e-delivery would increase or decrease the likelihood that savers read their plan disclosures. Similarly the Department has failed to provide any analysis on whether savers would better understand the regulatory disclosures that are provided to them. E-delivery of

⁶ It also suggests that defaults are very hard to overcome, given that inertia is a powerful force and savers may not expend the costs and burdens of reversing them. This further suggests that many savers who are defaulted into an electronic system that is not appropriate for them will stay in that inappropriate system and bear the costs of doing so.

⁷ Relatedly, the Department never considers the extent to which plan sponsors and service providers can encourage greater adoption of e-delivery. To the extent they bear the costs of paper disclosures that are delivered through the mail, they have an incentive to promote greater adoption of e-delivery by encouraging workers to affirmatively consent. They have a variety of tools at their disposal to encourage such action.

investor disclosures creates the potential to enhance the quality and timeliness of disclosures, including by promoting greater use of layered and interactive disclosures. Creating better disclosures in turn increases the likelihood that those disclosures will be read and understood.

The proposal recognizes this, explaining that e-delivery would “creat[e] the opportunity for disclosures that are more useful to participants and beneficiaries.” And certainly there is room for improvement. Too often, existing employee benefit plan regulatory disclosures are dense, unappealing, and presented in ways that are unlikely to convey critical information in ways that many savers can readily understand and use.⁸ If the Department were concerned about improving disclosures for plan participants, it would do well to focus on that problem. But nothing in the current proposal would actually bring that potential closer to reality, and it provides no incentives for financial services providers to invest in making plan regulatory disclosures more attractive and effective. As a result, under the proposal, investors are likely to receive electronically the same problematic disclosures that they currently receive in the mail and not benefit from the potential e-delivery has to offer. Such a result is unlikely to increase the likelihood that savers read and understand these disclosures.

Next, the Department justifies the proposal on the basis that it would reduce the costs and burdens imposed on employers and other plan fiduciaries. The Department has provided no evidence to support these claims. In all likelihood, the proposal would reduce direct costs for plan service providers, particularly recordkeepers, but that does not necessarily mean that employers and other plan fiduciaries would see a commensurate reduction in their costs. In other words, there’s no reason to believe service providers would pass along the cost savings from the rule to plan sponsors. It’s even harder to imagine any meaningful cost savings would be passed on to participants and beneficiaries. Assuming a per document cost of 80 cents per document,⁹ even if all of the cost savings were passed on to savers, which is highly unlikely, such savings would clearly be immaterial on the individual level. More likely, however, is that many of these cost savings for the industry would be shifted to savers. For example, to the extent a saver would want to retain a hard copy of a disclosure, the saver would be forced to internalize the printing and other associated costs for that decision. In short, it appears that this proposal is really intended to benefit the financial industry by saving them money, not workplace retirement plans or retirement savers.

II. Specific elements of the proposal are likely to harm a significant number of retirement savers.

First, the proposal is overbroad, covering an inappropriate selection of savers and plan disclosure documents. According to the proposal, any employee who provides their employer, plan sponsor, or administrator with an electronic address or is assigned by their employer an electronic address, would be a covered individual and therefore eligible to be defaulted into an electronic disclosure system. Thus, someone could be required to provide an email address in a job application as a condition of employment and be defaulted into an e-delivery system, even if they do not have regular email access or they are not comfortable accessing their plan documents online. Similarly, an employer could assign a company email to an employee for the purposes of

⁸ This is not to suggest that these disclosures don’t provide value to many savers and the market more generally. They can and do.

⁹ This is the per document cost assumed in the Swire and Kennedy-May paper. To be clear, we are not expressing any view of whether their assumed per document cost is accurate or reliable.

this rule, and the employee would be defaulted into an e-delivery system, even if the employee does not have regular email access at work or home and is not comfortable accessing their plan documents online. In that situation, the burden would be shifted onto the employee to overcome the default and go through the process of opting out of the e-delivery system, something that may be challenging to do, due to the fact that defaults are hard to overcome.¹⁰

In addition, the proposal covers every document that an employer is required to furnish automatically to participants and beneficiaries pursuant to Title I of ERISA. If, for the reasons noted above, some employees do not have regular access to email, these documents could go unseen for a significant number of savers.

The proposal also allows for a far fewer number of notices of plan disclosures to be sent to savers. In order for a plan sponsor to rely on the safe harbor, they need send only one initial written notification that they are defaulting the saver into electronic delivery. It appears that this notification can be buried in other documents provided by the employer, such as a new employee packet, which would diminish the prominence of the notice and, as a result, reduce the likelihood that the notice is seen and carefully reviewed.

Moreover, under the proposal, employers can also consolidate seven separate disclosure notifications into one annual notification. Combining seven separate notices about seven separate documents into a single notice reduces the chances that savers would be made aware of all of these different documents. As a result, if a saver missed the one consolidated annual notice, she would effectively miss out on being notified of the availability of seven different documents. That's a heavy price to pay for missing one notice. One way to minimize the risk that electronic notices go unread would be to include a provision in the rule stating that if a saver doesn't log into her account within two weeks of receiving a notice, the notice must be automatically sent again. And if the saver doesn't log into her account for any six month period, which would demonstrate that an electronic disclosure system is not working for her, she must automatically be defaulted back into a paper system.

Moreover, the proposal doesn't adequately ensure that any meaningful information about the disclosures' content, relevance, or importance would be conveyed in the notices that are sent. While the proposal requires that an administrator ensure that a notice provide a "brief description" of a covered document communicating key information about its importance, the proposal provides "a level of flexibility" to administrators in how they draft the "brief description." Thus, it is possible that an administrator could provide information that doesn't adequately convey the purposes of the document, the content of the document, its relevance to the saver, or its importance. This would increase the likelihood that the notice would be ineffective. One way to address this deficiency would be for the Department to come up with standard language that must be used in these notices, providing brief descriptions that effectively convey the relevant information.

In addition, there is ambiguity about whether and to what extent the proposal imposes on plan administrators a requirement to preserve electronic disclosures so savers can continue to view them. Under the proposal, the covered document can be deleted from a plan website if it is

¹⁰ See note 6.

“superseded by a subsequent version” of the document. It is unclear, however, how the Department would interpret this language. We would certainly hope, for example, that the Department would not view a more recent quarterly statement as a “subsequent version” of the previous quarterly statement, thus allowing the previous statement to be removed, but it could certainly be read that way. Such an approach would pose significant challenges for workers, including by limiting their ability to compare statement through time and by forcing them to save and print documents before they disappear, further shifting costs onto savers. We think the correct reading of this provision is that only in very narrow circumstances, such as when there is an error with a disclosure and a corrected version is added, should the prior document be “superseded.” However, given this ambiguity on what “subsequent version” means in this context, we request clarification on this vitally important point.

Finally, the proposal raises questions about whether the Department is playing fast and loose with its Administrative Procedure Act obligations. Specifically, the proposal first provides an effective date that would be 60 days after the date of the publication of the final rule. Then the proposal provides an applicability date that could be read to come before the effective date. It states that the rule shall apply on the first day of the first calendar year following the date of publication of the final rule. If the rule is finalized before the end of 2019, and it appears by all accounts that the Department is intent on ramming this through,¹¹ then the applicability date would be January 1, 2020. Yet in that scenario, the rule would still not be effective, which would raise questions about whether anyone can legally rely on the safe harbor.¹²

Conclusion

A successful transition to electronic delivery will occur only if it is done in a way that ensures retirement savers prefer to receive and consume disclosures electronically and get real value out of those e-disclosures. This proposal doesn’t begin to accomplish those goals. Just the opposite. It undermines those goals, and it does so for the clear benefit of the financial industry. For these reasons, we oppose this proposal and urge the Department to withdraw it.

Respectfully submitted,



Micah Hauptman
Financial Services Counsel



Barbara Roper
Director of Investor Protection

¹¹ The fact that a proposal of this importance was given a 30 day comment period reflects the fact that the Department is moving as fast as it can with this proposal.

¹² As the Department knows, significant rules (defined by Executive Order 12866) and major rules (defined by the Small Business Regulatory Enforcement Fairness Act) are required to have an effective date of 60 days after publication in the Federal Register. If an agency wants to make the rule effective before 60 days, it must cite good cause as to why that determination is in the public interest. Helping the financial industry save money does not constitute “good cause.”