

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

To Whom It May Concern:

The Alliance for Retired Americans is a national organization that advocates for the rights and well-being of over 4.4 million retirees and their families. In this effort, we fight to protect their health care, including lowering drug prices, and secure their hard-earned retirement benefits.

We are writing today because we have deep concerns about the proposed regulation on Default Electronic Disclosure, 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. While the world is changing, and more and more people use the internet, this is not relevant when it comes to an effective system for consumer disclosures and what should be default method for making them. Besides, access to the internet is not uniform or equitable. In fact, studies show that access to the internet and broadband still varies substantially by education, age, income, and geography. Making electronic delivery the default means of delivering retirement information would effectively weaken consumer protections for participants and beneficiaries, the very people whom the disclosures are intended to protect.

Older Americans would be particularly disadvantaged if the proposed rule were to go into effect, as more than a quarter of seniors over 55 years of age (26%) do not have access to the internet, and while smartphone use is at an all-time high, 32% of Americans over 55 do not own a smartphone.¹ Further, many seniors are leery of conducting financial business over the internet due to security and privacy threats.² Even those who do try would find it impractical and difficult to absorb the level of detailed information provided by the plans on such a device.

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, 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

¹Emily A Vogels., *Millenials stand out for their technology use, but older generations also embrace digital life*, September 19, 2019, <https://www.pewresearch.org/fact-tank/2019/09/09/us-generations-technology-use/>.

²Deborah Vollmer Dahlke, David Lindeman & Marcia G. Ory, *No longer just for the young: 70% of seniors are now online*, July 26, 2019, <https://www.weforum.org/agenda/2019/07/no-longer-just-for-the-young-70-of-seniors-are-now-online/>.

– the more reliable method of delivery -- and those who prefer to receive information electronically may do so.

However, DOL's 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 a default system of electronic hide and seek. Under this new system, plans would not even need to send an electronic version of the disclosure to the consumer. They would only 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. 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 regulations for "Notice and Access" are inadequate and contain few 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 phone call/robocall, which are not verifiable or easily preserved.
- **Email addresses can be made up:** 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.
- **The ability to get information on websites is an Alice in Wonderland scenario:** *The proposed rule will send retirees down the rabbit hole in search of information.* Consumers should not be forced 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. As one plan administrator put it in *Plan Sponsor* magazine "Imagine if the agency had adopted this proposal, say, 10 years ago. We would all be \$2.4 billion richer." Plan sponsors and administrators have a fiduciary duty to make decisions for the benefit of the participants and beneficiaries. Yet, this NPRM 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. It simply allows them to pocket the windfall and then shifts costs to retirees by requiring them to have purchased and maintained internet access and the hardware, software, supplies needed to access disclosures. That is deeply galling.

This proposal is being promulgated 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. The proposed rule's framework and the specifics of the proposal impose all of the disadvantages of technology, but confer none of its advantages, for the benefit of participants and beneficiaries. Instead, it shifts all of the risks, burdens, and costs of ensuring adequate disclosure away from plan administrators and on to participants and beneficiaries. This proposal should be withdrawn, or at least extensively overhauled to ensure actual receipt of disclosures and adequate consumer protections.

Thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink that reads "Richard J. Fiesta". The signature is written in a cursive, flowing style.

Richard J. Fiesta
Executive Director