

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 National Consumer Law Center (NCLC) is a non-profit organization that uses its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults. NCLC submits these comments on behalf of its low-income clients to oppose the Department's NPRM regarding Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, RIN 1210-AB90, published at 84 Fed. Reg. 56,894 (Oct. 23, 2019). This proposal would reduce consumers' ability to access important retirement plan documents.

A 2016 NCLC report noted the importance of ensuring that paper statements for credit cards, bank accounts and mortgages be available for free for consumers who want them, and that consumers not be coerced into electronic statements or steered into them by default if paper is the consumer's first choice.<sup>1</sup> These principles are particularly important for retirement plan disclosures.

ERISA requires administrators of retirement plans to furnish several understandable, important disclosures to plan participants and beneficiaries (e.g., surviving 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.<sup>2</sup> Currently, longstanding regulations require plans to *furnish* disclosures and take steps to ensure *actual receipt* of the disclosure by participants and beneficiaries. Plans must send paper disclosures by mail as the default means of delivery, but can offer consumers the choice to *opt in* to electronic delivery.<sup>3</sup>

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<sup>1</sup> Chi Chi Wu, Lauren Saunders, Paper Statements: An Important Consumer Protection, March 2016.

[https://www.nclc.org/images/pdf/banking\\_and\\_payment\\_systems/paper-statements-banking-protections.pdf](https://www.nclc.org/images/pdf/banking_and_payment_systems/paper-statements-banking-protections.pdf)

<sup>2</sup> Examples of ERISA-required disclosures include the Summary Plan Description (the plan terms and conditions), Summary of Material Modifications (change made to the plan's rules), annual reports on the solvency of the plan, pension benefits statements, as well as notices about payment options at retirement and spousal consent forms, disclosures about the fees being charged by investment funds in a 401(k), and many more.

<sup>3</sup> Plans are permitted to send documents out electronically by default (with a paper opt-out) to workers who use a computer as an integral part of their job duties, but otherwise, consumers must affirmatively opt in to electronic delivery. Moreover, the electronic disclosure itself must meet many conditions. *See* 2002 Electronic Disclosure Safe Harbor, 29 C.F.R. 2520.104(b)-1(c).

However, the electronic disclosure (E-Disclosure) regime that is now being proposed,<sup>4</sup> which would cover both defined benefit (traditional-style pensions) and defined contribution plans (like 401(k)s), reverses the default from paper disclosures sent by mail to a system of electronic hide and seek. Under this new system of “notice and access,” 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, and then the burden would fall entirely on the participant or beneficiary to take the many steps involved in finding it.

While the proposal would allow participants and beneficiaries to opt out of electronic disclosures and instead receive paper by mail, the proposal lacks adequate protections for consumers, no matter which method of delivery is selected. Because the E-Disclosure proposal would substantially weaken protections for the very people whom the disclosures are intended to protect, NCLC is opposed to this proposal, and submits these comments on our objections.

The bottom line is, as NCLC discussed in a joint 2018 response to a request for information from the Consumer Financial Protection Bureau, that consumers must have the right to receive critical information in the manner that works for them.<sup>5</sup>

### **Access to and Use of Broadband Internet Access Remains Unequal, Making Default Electronic Disclosure Inequitable**

Making electronic delivery the default means of delivering retirement disclosures would be inequitable. Access to and use of the internet has greatly expanded over the last 20 years; according to Pew Research Center, the percentage of adults ages 18 and older who use the internet has grown from about half in 2000 to 90% in 2019.<sup>6</sup> This growth has not been uniform, however; access to the internet and to broadband is substantially lower for several demographic groups:

- *Age* - 12% of adults 50-64 and 27% of adults 65 and older do not use the internet.<sup>7</sup> Consequently, there is a huge number of retired participants and beneficiaries who still need retirement plan disclosures but cannot access the internet.
- *Education* - 16% of those with a high school diploma, and 29% of those with only some high school, do not use the internet.<sup>8</sup>
- *Income* - 18% of those who earn \$30,000 or less do not use the internet.<sup>9</sup> Among those low-earners, more than 4 in 10 (46%) don't have a traditional computer or laptop or

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<sup>4</sup> Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, RIN 1210–AB90, 84 Fed. Reg. 56894 (NPRM, proposed Oct. 23, 2019), at <https://www.govinfo.gov/content/pkg/FR-2019-10-23/pdf/2019-22901.pdf> (*E-Disclosure NPRM*).

<sup>5</sup> Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information Regarding the Bureau's Inherited Regulations and Rulemaking Authorities – electronic disclosures, statements, records and other communications, June, 2018. <https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-electronic-communications.pdf>

<sup>6</sup> Pew Research Ctr., *Internet/Broadband Fact Sheet* (June 12, 2019), available at <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/> (*Fact Sheet*).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

(don't have broadband service at home 44%). About 3 in 10 (29%) don't own a smart phone.<sup>10</sup>

- *Geography* - 15% of those who live in rural areas do not use the internet.<sup>11</sup>

More than one-fourth of adults do not have broadband service at home.<sup>12</sup> For some, this is because their community is not yet wired for broadband;<sup>13</sup> for others, it is because of the fairly steep monthly cost (50%). Still others don't have home broadband because they have access elsewhere, e.g., at their jobs (43%), or they access the internet using only a mobile phone (45%).<sup>14</sup> Some populations are dependent on smart phones for their access to the internet.

- *Income* – About one-fourth of low earners (\$30,000 or less) were dependent on a smartphone for internet access in 2019.<sup>15</sup>
- *Race/Ethnicity* – About one-fourth of black (23%) and Hispanic (25%) adults are dependent on a smartphone for internet access, compared to 12% of whites.<sup>16</sup>
- *Education* – 24% of high school graduates and nearly one-third (32%) of those with some high school are dependent on smartphones.<sup>17</sup>

This is significant, because while one may be able to “access” the internet with a smartphone, these devices are wholly inadequate to the task of reading complicated financial disclosures and notices, or being able to print out or store them for future reference. Put simply, internet access that is dependent on a smartphone is not meaningful access, and should be counted as “no internet access at all” for purposes of retirement plan disclosures.

Women and men's rates of internet access and use are roughly the same.<sup>18</sup> However, because women more often shoulder caregiving responsibilities with fewer years in the workforce, and because they still earn less than men, women are more reliant than men on receiving retirement benefits as *beneficiaries* -- as surviving spouses and as divorced spouses. The law provides important spousal rights to a worker's pension or 401(k) balance, but the exercise of these rights depends upon important disclosures, notices, and spousal consents. Currently, notices and spousal consents must be in writing and notarized. The E-Disclosure NPRM makes no provisions to protect spousal rights, such as by ensuring that spouses receive separate disclosures and election options, or written consents that can be authenticated, so that they can be relied upon when needed.

DOL concedes that these gaps in access may create impediments to accessing critical plan information, for instance by requiring a participant to go to an insecure terminal at a public library, and would have an adverse impact, but claims it can't quantify that impact and provides

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<sup>10</sup> M. Anderson & M. Kumar, *Digital divide persists even as lower-income Americans make gains in tech adoption* (Pew, May 7, 2019), available at <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>.

<sup>11</sup> *Fact Sheet*, *supra* n. 4.

<sup>12</sup> *Id.*

<sup>13</sup> See, A. Perrin, *Digital gap between rural and nonrural America persists* (Pew, May 31, 2019), available at <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/>.

<sup>14</sup> M. Anderson, *Mobile Technology and Home Broadband 2019* (Pew, June 13, 2019), available at <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>.

<sup>15</sup> Pew Research Ctr., *Mobile Fact Sheet* (June 12, 2019), available at <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Fact Sheet*, *supra* n. 4.

no solutions.<sup>19</sup> The proposal’s provision enabling individuals to globally opt-out of electronic delivery and to affirmatively select paper/mail for all disclosures *helps* answer this problem, but doesn’t answer it completely, due to inadequate notice requirements, participant inertia or misunderstanding of the significance of the election, lack of understanding/engagement with retirement benefits, plus the fact that participants often need the disclosures decades after terminating employment, or for a surviving spouse, many years after retirement.

### **The Proposed Electronic “Notice & Access” Framework Is Inadequate to Accomplish ERISA’s Mandates**

Unlike current requirements for electronic disclosures, this E-Disclosure NPRM contains next to no protections to ensure that individuals *actually receive* these disclosures.

- *Technology agnostic* - The NPRM doesn’t specify how the plan must electronically notify consumers about disclosures. While the NPRM contemplates that the notice would be provided by email, there is no requirement to use email; plans could notify consumers of the availability of a disclosure with a text message, a phone call/robocall, or some other, future, electronic means. In many cases, this notice would not be verifiable or preservable. At a minimum, phone calls should not be counted as adequate notice.
- *Unreliable and Unused email addresses* - The NPRM would allow plan administrators to assign or even make up email addresses for participants and beneficiaries. While it is common for employers to assign an email address to employees who work with computers, not all employees use email in their jobs. Once a worker leaves that job, the administrator need only take measures reasonably calculated to ensure the “continued accuracy” of the email address. Retirees and former employees with vested benefit or a 401(k) account are easy to lose track of because they may not be claiming a retirement benefit until decades later; their beneficiaries are even more remotely connected to the plan. The NPRM acknowledges that “unique issues” arise for vested participants once they leave the job, but then it utterly fails to resolve them in a satisfactory way. For instance, if an email notice bounces back, the plan administrator may, but is not required, to send a paper notice.<sup>20</sup> Bounce-backs should require a paper notice and opt-in election. Also, former employees and beneficiaries should not be considered “covered individuals” under the new framework; instead, once individuals sever employment, they should automatically be sent paper disclosures unless they affirmatively opt in to electronic delivery.
- *No actual receipt required* - There is no requirement whatsoever that the administrator confirm that email was actually opened by the recipient, a fact that is easily determined by company software. Thus, if the email goes to a spam folder, gets buried or misfiled, or is simply deleted (perhaps by mistake) without opening, the recipient never *actually receives* the notice or the disclosure. Nor is there any requirement that the recipient actually accessed the document. Plan administrators should be required to ensure that the email notice was opened, and that the participant actually followed the website link provided and opened or downloaded the required disclosure. Unless *both* occur within a reasonable amount of time given the nature of the disclosure/notice – occurrences that are easily determined by the plan administrator – the administrator should be required to send a paper notice by mail.

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<sup>19</sup> *E-Disclosure NPRM*, *supra* n. 3, at 56915-16.

<sup>20</sup> See *E-Disclosure NPRM* Preamble, *supra* n. 3, at 56905-06; proposed 29 C.F.R. 2520.104(b)–31(f)(4), *E-Disclosure NPRM*, *supra* n. 3, at 56922.

- *Notice access requirements inadequate* - While the NPRM does impose certain requirements on the email notices, they are insufficient. For instance, it requires each disclosure to trigger a separate notice, but then it allows notices to contain graphics and “design” elements, and it allows administrators to send out “consolidated” notices containing 7 different, and often lengthy, important disclosures such as the Summary Plan Description and Pension Benefit Statements. Nor are the content requirements adequate to convey the significance of the initial opportunity to opt out of electronic disclosures and the many advantages of paper.
- *Website access requirements inadequate* - The NPRM contains several important standards for website access, but they are also wholly inadequate. There is no requirement that the link provided to the recipient take the individual directly to the disclosure (after a security login). Participants and beneficiaries may have to wade through an undetermined amount of marketing communications or several pages in order to find the disclosure. All of this adds up to multiple barriers to actual receipt of disclosures by participants and beneficiaries. Instead, the disclosure should be the first thing the participant or beneficiary sees after following the link and logging in. Also, while the NPRM requires notices to be in an accessible format, retirees who have home internet still may not have up-to-date software to be able to adequately access the website or document, or have the equipment to be able to preserve or print out the electronic document.
- *Beneficiary rights not adequately protected* – The NPRM 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. Written spousal consent is also required to give up the right to receive the balance of a worker-spouse’s 401(k) account in the event the worker dies while the funds are in the plan and to designate a different beneficiary. Nor does the NPRM create any separate notice and security requirements for spouses, divorced spouses (alternate payees), or other beneficiaries. It doesn’t even mention how the current requirement that the spouse’s signature on consent forms be notarized.

### **Protections to Ensure Document Preservation Are Ignored**

An absolutely critical role that retirement plan disclosures play is that they provide written proof of the rules that applied at the time a worker was participating in the plan, and evidence of the benefits earned. Participants and beneficiaries often need access to documents decades after they have vested and terminated employment, or decades after retirement, to make claims to benefits and ensure benefits are correct. Requiring plan administrators to retain all prior documents (versions and applicability dates) and make them easily accessible to participants and beneficiaries some 40 years later is easy for an administrator to do – just preserve the documents and disclosures on a server and archive them to be searchable. Yet, the NPRM not only fails to require such preservation, it permits administrators to delete the prior documents on the website as soon as they are superseded. There are other problems too. A consumer may download a document to a hard drive, but hard drives often fail and are not always recoverable. Those dependent on a mobile phone are unlikely to be able to print out or preserve a document on the phone. Heirs may need to locate documents after a participant or beneficiary dies, but without paper, they must have the decedent’s login information, and even then, the applicable documents may be gone due to the lack of a preservation requirement.

### **Opt-Out Provisions Are Also Inadequate**

The NPRM contemplates that all of these 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, or to request paper copies of specific disclosures free of charge. There is also a requirement that the consumer be informed how to exercise their right to paper. But there are no requirements for what this process should look like. For instance, those who prefer paper should not be required to write a letter, or uncheck a pre-checked box, or locate well-hidden “preferences” in order to get paper. The process to elect paper should be a prominent check box on the initial disclosure, and a prominent button/link in each electronic notice and on the website page with the disclosure.

Moreover, people need to understand the significance of the choice they have. In the initial notice especially, participants should be apprised of all the advantages and disadvantages – such as those discussed in these comments – of giving up their rights to paper disclosure. E.g., “If you don’t opt out for paper, all the burden will be on you to be aware of and act on the electronic notice, to find the disclosure on the provider’s website, to save it on your computer, and to print it out for safekeeping, for you and your heirs.” Certain groups should actually be advised to globally opt out for paper: retirees and former employees, those who rely on mobile phones for internet access and/or don’t have a computer with internet access at home, and beneficiaries. Participants and beneficiaries should also receive an *annual* reminder notice of their right to globally opt out of electronic delivery and how to do it.

Finally, the NPRM fails to impose any requirement on plan administrators to maintain electronic access for those who prefer paper. Administrators should not be allowed to “punish” those who elect paper by denying them electronic access to the documents or the website. Those who elect paper should be able to get both, just as those who accept electronic delivery can *also* request a paper copy of that electronic document. The regulations should require that paper choosers still get online access to documents as well as to online tools and information.

### **The NPRM Provides a Financial Giveaway to the Financial Services Industry, Shifts Costs on 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, “Imagine if the agency had adopted this proposal, say, 10 years ago. We would all be \$2.4 billion richer.”<sup>21</sup> Tax-qualified plans are supposed to be operated and managed solely for the benefit of participants and beneficiaries. 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. Any savings generated by an electronic default should be required to be documented and then given to the plan/participants. On the other hand, all of the financial costs of purchasing equipment (e.g., a computer), maintaining internet access, and printing out disclosure documents (including ink and paper) would now be shifted to participants and beneficiaries.

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<sup>21</sup> M. Barry, “Barry’s Pickings: Software Eats ERISA Disclosure,” *PLANSPONSOR* (Nov. 1, 2019), <https://www.plansponsor.com/barrys-pickings-software-eats-erisa-disclosure/>.

## **The Proposal Ignores Consumer Preferences and Research on the Comparative Effectiveness of Communications Methods**

What consumers want is never discussed in the NPRM. Participants and beneficiaries – the people for whom these disclosure requirements exist – are not clamoring for an electronic “notice and access” framework. In fact, study after study, including those conducted by the financial services industry, find that the majority of consumers prefer their financial documents to be delivered on paper in the mail.

- When investors were asked how they would prefer to receive disclosures, paper documents in the mail was the most frequently chosen method (49%) among respondents surveyed. *Only 6% said they wanted disclosures by accessing the internet – the method this NPRM would impose as the default method of delivery.*<sup>22</sup>
- Retirement plan participants *of all ages* overwhelmingly (74%) think the retirement disclosure rules should make paper documents sent by mail the default, with an option to request electronic delivery, rather than in electronic form with an option to request paper. Only 21% said they preferred receiving an email with a link to a website as the rule.<sup>23</sup>

Nor is there any discussion of the extensive research on what types of communications are more often noticed, read, understood, and preserved. For instance, retirement plan participants are more likely both to read and save retirement documents that are on paper rather than in electronic form.<sup>24</sup> Moreover, people are more likely to give print disclosures a “systematic, deeper reading” than those delivered in online formats, and this deeper reading affected comprehension, and “in turn affected personal asset allocation decisions.”<sup>25</sup>

## **Conclusion**

The NPRM’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.

The current opt-in system is working well to ensure actual receipt. It should be retained for all important, personalized, and action-required documents. If plans want to deliver some less important, non-personalized documents electronically, that is reasonable, but the list needs to be substantially narrowed down, and adequate protections need to be in place. Until then, this proposal should be withdrawn.

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<sup>22</sup> FINRA Investor Ed. Fdn., *Investors in the U.S. 2016*, at 13, available at [https://www.usfinancialcapability.org/downloads/NFCS\\_2015\\_Inv\\_Survey\\_Full\\_Report.pdf](https://www.usfinancialcapability.org/downloads/NFCS_2015_Inv_Survey_Full_Report.pdf).

<sup>23</sup> R. Perron, *Paper by Choice: People of All Ages Prefer to Receive Retirement Plan Information on Paper*, at 11 (AARP, Nov. 2012), available at <https://www.aarp.org/work/retirement-planning/info-11-2012/retirement-plan-information.html>.

<sup>24</sup> *Id.*

<sup>25</sup> J.W. Hutchinson, R. Botto, *et al.*, *Financial Communications and Asset Allocation Decisions: The Effects of Reading Style, Financial Knowledge, and Individual Differences*, at 1 (TIAA Institute, June 2017), available at [https://www.tiaainstitute.org/sites/default/files/presentations/2017-06/Hutchinson%20Zauberman%20Botto\\_Financial%20Communications\\_RD\\_June2017.pdf](https://www.tiaainstitute.org/sites/default/files/presentations/2017-06/Hutchinson%20Zauberman%20Botto_Financial%20Communications_RD_June2017.pdf).