

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:

Before I recently retired, I spent my career advocating for policies to ensure and improve economic security for workers and retirees. During that time, I was actively involved in several efforts to preserve adequate disclosure protections for retirement plan participants and beneficiaries. Based on that experience, I oppose the proposed E-Disclosure regulations.

Under the current disclosure regime, plans must send paper disclosures by mail as the default means of delivery, with two narrow exceptions: consumers can affirmatively choose to *opt in* to electronic delivery, and those who work with computers on the job may receive electronic disclosures. This system is sound, well-balanced, and working well. However, the “notice and access” default regime proposed in the NPRM is so deeply flawed it should be withdrawn.

- **It fails to ensure *actual receipt* of disclosures by participants and beneficiaries.**
 - There are no requirements on administrators to ensure that consumers actually open the notice, go to the website, and open the disclosure document, even though technology already allows senders to make these determinations. What if the email goes to the recipient’s spam folder and is never seen?
 - Administrators are relieved of any obligation to ensure that participants and beneficiaries have meaningful access to the internet, either on the job or after they terminate their employment or retire.
 - The proposal concedes that many demographic groups still lack access to the internet, or are dependent upon devices that are wholly ill-suited for reading and saving financial documents.¹ It even admits the proposal will adversely impact these groups. But the proposal makes no serious attempt to address this harm.
 - 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. Currently, notices and spousal consents must be in writing and notarized.
 - The proposal allows for consolidated notices that will be overwhelming, confusing, and too infrequent to provide meaningful disclosure.
- **It ignores what consumers want.** Study after study, including those conducted by the financial services industry, find that the majority of consumers of all ages prefer their financial documents to be delivered on paper in the mail.² *Only 6% of investors say they want disclosures by accessing the*

¹ See Pew Research Ctr., *Internet/Broadband Fact Sheet* (June 12, 2019), available at <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>; 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/>; Pew Research Ctr., *Mobile Fact Sheet* (June 12, 2019), available at <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

² 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>.

internet – the method this NPRM would impose as the default method of delivery – whereas 49% say they prefer paper.³

- **It substitutes an ineffective method of consumer disclosure in place of an effective one.** Paper communications are more likely to be noticed, read, understood, and saved. In fact, the industry already knows this. When they really *want* participants to receive, read, and act on a communication – such as in the pension derisking context when they want workers and retirees to give up their rights to a lifetime pension in favor of taking a lump sum cash-out – paper and the US mail are their delivery vehicles of choice.⁴
- **Even the provisions allowing participants and beneficiaries to opt out and receive paper disclosures lack adequate protections for consumers.** One initial “global” opt-out opportunity on paper is not nearly enough; they should at least be annual. Consumers need to understand the significance of the choice by receiving prominent warnings about the advantages of paper and the disadvantages of e-disclosure. There are no requirements to ensure that the opt-out is easy. Those who elect paper should be able to get both paper and electronic access, just as those who accept electronic delivery can *also* request a paper copy of that electronic document.
- **The proposal shifts all of the burden for printing and preserving documents on consumers, while letting administrators off the hook to retain all prior documents.** One 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 for surviving spouses. Plan administrators should be required to preserve all prior documents and disclosures on a server/in the cloud and archive them to be searchable. Yet, the NPRM permits administrators to delete the prior documents on the website as soon as they are superseded.
- **Financial services providers will pocket billions in extra profits without any duty to pass on the savings to those whom they have fiduciary responsibility to protect.** Tax-qualified plans are supposed to be operated and managed solely for the benefit of participants and beneficiaries. Yet, this NPRM imposes absolutely no requirement for plans to document and pass on any savings generated to the participants.

This proposal shifts all of the risks, burdens, and costs of ensuring adequate disclosure away from plan administrators and on to participants and beneficiaries. It imposes all of the disadvantages of technology on participants and beneficiaries, but confers none of its advantages. This E-Disclosure NPRM will substantially weaken protections for the very people whom the disclosures are intended to protect. It should be withdrawn.

Sincerely,
Deborah Chalfie
Takoma Park, MD

³ 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.

⁴ See e.g., Aon Hewitt, *Pension Settlements Through Terminated Vested Lump Sum Windows: Insights into Plan Sponsor Experience* 7-8 (Feb. 2012) (no longer accessible on internet) (“high touch” communications such as phone calls, postcards, and mailings with “paperwork” led to higher election rates of lump sums); Towers Watson, “Pension De-Risking through Lump Sum Offers” 2-3 (*Viewpoints* newsletter) (May 15, 2013), available at <http://web.archive.org/web/20151022194232/https://www.towerswatson.com/en/Insights/Newsletters/Global/strategy-at-work/2013/Viewpoints-QA-Pension-De-Risking-Through-Lump-Sum-Offers> (“mailing printed information to eligible participants’ homes is still the best method, because it’s the channel most likely to reach them”).