

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

I am Norman Stein. I teach tax and employee benefits at the Kline School of Law at Drexel University and I also serve as senior policy advisor to the Pension Rights Center, a consumer organization. These comments, however, are my personal views and do not necessarily reflect the views of either Drexel University or the Pension Rights Center.

One of ERISA's contributions to the law of employee benefits was an increase in transparency, to ensure that participants in benefit plans understood the coverage and scope of their plan and knew their rights and obligations under the plan. Thus, ERISA requires that plans provide meaningful and comprehensible disclosure to plan participants. This knowledge can enable employees to identify, understand, and rely on the benefits promised to them; to engage in appropriate financial and retirement planning; to evaluate plan investment choices and alternative forms of benefit distributions; to monitor plan performance; and to enforce their plan rights.

Existing Department of Labor guidance requires 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 for individuals who do not regularly work at computers, but can offer these participants and beneficiaries the choice to opt into electronic delivery.

The Department has proposed changing this regime, not only to reverse the default rule but also to put in place a "notice and access" regulatory scheme, in which a plan would merely notify employees by e-mail or text that a disclosure document is available on a website. (The employer would be able to assign e-mail addresses to employees.) The employee would then have to locate the document and, if the employee wants, to download it or print it. The proposed

regulation would permit the employee to opt out of this scheme and revert to paper disclosure. I note an obvious point: most plan participants will not take the steps to opt out of the default regime—if they would, the current system permitting employers who do not use a computer at work to default into electronic disclosure would achieve all of the benefits that the new regulation purports to create.

I appreciate the impetus behind the proposed regulations. The use of electronic disclosure reduces plan costs. And I believe that at some future point—perhaps in a decade or two—it will be unusual for participants to lack computer and electronic literacy. But that is only a prediction. We are not at that point now. I am certain that the Department will receive comments documenting that a significant percentage of plan participants today (particularly older participants, less educated participants, and participants for whom English is not their primary language) are not fully electronically literate and will struggle to varying degrees with electronic disclosure. And we know from behavioral economists, and frankly from common sense, that inertia will ensure that many people will not take affirmative action to opt into an alternative system, even if the alternative system is their better choice.

I thus think the moment for this new approach—automatically opting people with an e-mail address into electronic disclosure—has not yet arrived, although it may arrive at some point in the future. Today, more sophisticated empirical research is needed to determine the percentage of participants who will not be able to adequately access documents online and the percentage of people in that group who are likely to take affirmative action to opt into the more traditional paper disclosure system.<sup>1</sup>

There are a number of ideas that the Department could consider in lieu of the proposed safe harbor, which would increase use of electronic disclosure by

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<sup>1</sup> I also note that today's electronic communications technology is materially different than it was even five years ago. I can attest from my own experience that some people will not keep up with technological advances as they age and therefore have more difficulty navigating online platforms in the future than they have today. But plans will almost certainly adopt new technologies, so problems that older workers today face in accessing online materials will probably be faced by tomorrow's seniors, notwithstanding that they are currently technologically literate.

technologically capable workers while ensuring that those without adequate technological skill will receive disclosure in a usable form. These include:

- 1) A rule that would permit a plan to provide an initial default into electronic disclosure but if a participant does not access documents within any six-month period, the participant would then be automatically defaulted into paper disclosure. This would provide some assurance that only people actually accessing electronic disclosure are defaulted into electronic disclosure for the long run.
- 2) An approach where participants on initial employment or plan eligibility must make a paper affirmative disclosure election between electronic and paper disclosure delivery, with no automatic default into either electronic or paper disclosure. This might impose a modest-one time cost on human resource departments to ensure that all participants makes the required election between paper and electronic disclosure. If a plan considers that cost too high, the plan could continue to use the current default regime that the proposed rule would replace.
- 3) Permit plans to provide incentives for individuals to elect electronic disclosure, with paper disclosure being the default—for example, a gift card or small cash payment to choose electronic disclosure.

Finally, because plans generally do not archive all plan disclosures, electronic disclosure places a burden on employees to download or print documents and retain them. Moreover, individuals who read disclosures on phones or other devices not linked to a printer are unable to print required documents for their records. Thus, a rule permitting plans to offer electronic disclosure, including the rule currently in effect, should condition electronic disclosure on the plan's agreement to archive permanently all plan disclosures, including benefit statements.

Respectfully submitted,

Norman Stein  
618 NE 78<sup>th</sup> Street  
Seattle, Washington 98115  
[nps32@drexel.edu](mailto:nps32@drexel.edu)