



April 28, 2020

The Honorable Paul Ray
Administrator, OIRA
Eisenhower Executive Office Bldg.
1650 Pennsylvania Ave. NW
Washington, DC 20503

Re: Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA (RIN 1210-AB90)

Dear Administrator Ray:

On behalf of the Coalition for Paper Options (CPO), we submit the following comments in strong opposition to the above referenced proposed rule. CPO represents a broad coalition uniting the print communication industry with consumer, senior, and rural advocates who are concerned about citizen choice in managing important financial information.

The Spirit and Intent of Executive Order 13847 Has Been Ignored

The e-disclosure rule stems from Executive Order 13847 that charged the Department of Labor with completing "a review of actions....to make retirement disclosures...more understandable and useful for participants...while also reducing costs on employers. The rule shall include an exploration of the broader use of e-delivery as a way to improve effectiveness."

Instead of carefully considering how to make the disclosures more useful for participants, we believe DOL bypassed this goal and went straight to a proposed rule to mandate e-delivery as the default method of delivery for these critical documents.

DOL Failed to Conduct Sound Regulatory Impact Analysis or Evidence-Based Research

The Agency's regulatory impact analysis of this rule was one-sided and severely deficient. Executive Orders 12866 and 13563 direct agencies to only regulate if there is a compelling need, and if so, to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. The Agency's economic analysis fails on all counts. DOL has not shown or demonstrated that this regulation is necessary; to the contrary, the current 2011 regime is working well and those who prefer to go paperless can already choose to do so. DOL has not shown that its proposal meets a compelling public need nor that its proposal is more optimal than the current regime. The Agency also fully admits that many populations – including rural residents, older

adults, low-income families, racial minorities, and many others lack adequate access to internet service and suitable equipment, will face impediments, and be disproportionately impacted – in other words, the rule will magnify inequity – yet it made no attempt to gather data on or quantify that impact, instead advising that those disregarded workers and retirees go to the library or a family member’s house. Nor did the Agency quantify the many benefits participants and beneficiaries now reap from the existing regulations, or the huge costs the rule would impose on them. Buying and maintaining home computer equipment constitute real, substantial costs, and monthly fees for internet service are high, not to mention the costs of losing pension benefits if one cannot later produce the documents proving entitlement to those benefits. In short, DOL spent pages trying to quantify the savings to the financial services industry, at whose behest the rule was promulgated, but never quantified or weighed the tremendous harm this rule would impose on the public.

Survey research on this topic would have revealed a difference between access to the internet and a strong and consistent participant preference for paper-based information when it comes to important financial information. Similar research done by the Financial Industry Regulatory Authority (FINRA)¹ and by the Securities and Exchange Commission (SEC)² reveal a strong preference for paper on the part of individual investors. The DOL has ignored this research around user preference and instead relied on the assumption that increased access to the internet means that everyone is comfortable using it.

According to Pew Research³, the digital divide remains real. The coronavirus pandemic has highlighted this divide by revealing the inability of key demographic groups to implement distance learning. Those same households will have trouble accessing retirement account information online and will have the most difficulty navigating their way back to paper statements.

Furthermore, the existing numbers reflecting “access” to the internet include those who do so with smartphones. The ability to read and digest complex information on such small screens is highly questionable and is likely to further reduce the numbers of individuals who will read the required notices. DOL also contemplates allowing employers to assign e-mail addresses to employees to establish consent for e-delivery with no requirements to ensure that those individuals want or will use the addresses.

Finally, the Department’s failure to conduct more significant research on these issues is directly contrary to the letter and intent of the new Foundations for Evidenced-Based Policymaking

¹ FINRA Investor Education Foundation, Investors in the US 2016, Financial Industry Regulatory Authority, Inc. (Dec. 2016).

² Investor Testing of Mutual Fund Shareholder Reports, Siegel & Gale Report to the SEC (2011, Revised 2012).

³ Pew Research Center, Digital Divide persists even as lower-income Americans make gains in tech adoption, May 7, 2019

Act of 2018, which was enacted into law late in 2018 and requires agencies to increase their research and evaluation practices for public rulemaking.

Federal Government Experience with E-Delivery Mandates Demonstrates Flaws

DOL also cites as evidence for how well e-delivery can work, two examples that clearly illustrate the flaws with this approach that will harm wage earners and retail investors.

The experience with online access of Social Security benefit statements and the proxy voting process for investments regulated by the SEC are but two examples showing steep declines in readership and participation following conversion to online distribution.

The Social Security Administration (SSA) eliminated the printed version of the Social Security Statement in January of 2017 without any congressional oversight. According to the SSA's Inspector General⁴, in a report to Congress in 2019, the SSA's action reduced the paper delivery of statements from a high of 155 million statements in FY 2010 to fewer than 15 million in FY 2018 (the remaining mailed statements were only to those wage earners over 60 who had not yet retired, nor had signed up for e-delivery).

Furthermore, the IG report found that only 16.8 million Americans viewed their statements online in 2018.

The Social Security Statement may be costly to mail, but the impact of millions of Americans losing track of their recorded earnings history and not having an annual reminder of the need to supplement their retirement savings will be incalculable. Rather than validating the wisdom of mandated e-delivery, the SSA's experience should warn other agencies against a similar approach.

The "mySocial Security" portal is a terrific tool for those who want it, but the information on the Social Security Statement was intended to drive education about the Social Security program, and now more than 120 million Americans are in the dark because the agency, without careful evaluation thought forced e-delivery would be effective.

The SSA's experience with e-distribution has demonstrated the lack of public engagement with e-only delivery of these important documents.

Similarly, DOL cites the SEC's experience with the 2005 switch to e-delivery of corporate proxy statements as another successful example. This rule decreased the voting of retail corporate

⁴ Office of Inspector General, Social Security Administration. A-03-18-5074 February 2019

shares by 75% and has, according to the Conference Board⁵, increased challenges by shareholder activists during shareholder meetings – a result directly contrary to its original intent.

These two examples should have raised warning signs to the Department.

Congress is Moving to Reverse E-Delivery Policies

In response, the House Ways & Means Committee unanimously approved legislation in December 2019 titled the Know Your Social Security Act to reinstate the mailing of printed Social Security statements to all wage-earners. The bills, H.R. 5306 and S. 2989, have 28 bipartisan sponsors in the House and 10 in the Senate.

Regarding the DOL proposal, a group of 38 bipartisan Members of Congress signed a letter late last year to the DOL asking that this rule not move forward because of the negative impact it would have on their constituents. The letter has been provided to OIRA for your consideration. During the 30-day comments period, only two members of Congress wrote in support of the rule and the public comments were 74% in opposition to the rule.

The DOL Rule Would Expose Millions of Unsuspecting Plan Participants to Cyber Crime

The Rule is clearly designed to push millions of plan participants into e-access of their accounts. Unfortunately, many of those individuals will be unsuspectingly subjected to phishing scams and other cyber-criminal activity. Allowing for the continued natural transition to electronic access makes far more sense than trying to push citizens into it who may not be ready to manage the risk. E-mails that ask plan participants to log in to fake sites risk exposing citizens' accounts and put their identities at risk. We believe no one should be pushed into electronic access before they are ready to opt-in to that selection.

This Rule is Not Justified Under Longstanding Regulatory Principles Requiring Compelling Need

Under the first principle of Executive Order 12866 – which has governed U.S. regulatory planning and review for over 25 years – an agency may not issue a regulation to disrupt the status quo unless the agency clearly demonstrates that there is a “compelling public need” E.O. 12866, Sec. 1(a).⁶

⁵ Fabio Saccone, E-Proxy Reform, Activism, and the Decline in Retail Shareholder Voting, The Conference Board (Dec. 2010)

⁶ E.O. 12866 also recognizes that regulation may be justified where “required by law” or “necessary to interpret the law,” but neither condition applies to these regulations, which are discretionary. See Sec. 1(a).

DOL has failed to demonstrate such a compelling public need. The current system is working, and people who want electronic information delivery should be able to opt-in for it. DOL has failed to properly account for the importance of informing consumers via paper-based information.

Under the status quo, consumers who prefer their retirement plan disclosures on paper have their preference honored, and consumers who prefer electronic disclosure are opting in to electronic delivery. E-Delivery has been growing steadily as citizens become more adept at technology. There is simply no compelling evidence in the record to suggest mandated e-delivery will increase readership of the documents subject to the proposed rule.

There are many rational reasons why workers and retirees prefer paper disclosures of this important and sensitive information.

- Investors continue to consistently prefer paper-based financial information.⁷
- Studies indicate reading comprehension improves with paper-based information.⁸
- Broadband access remains sparse in many areas of the country.⁹
- Cyber-security concerns have cemented a preference for paper-based information for many people.

Yet, at the urging of retirement plan fiduciaries who are responsible for keeping workers and retirees informed, EBSA is assuming that worker preferences are null or meaningless, and that EBSA must take the paternalistic action to reverse the current default and compel consumers into an electronic-only default system unless they go through new hurdles to retain their current paper disclosures. There is no compelling evidence that DOL knows better than the millions of workers who prefer to receive their particularly sensitive and important retirement information in paper form and have chosen not to opt into e-delivery.

Regulating Would Fail to Maximize Net Benefits to Society

It is apparent that EBSA fails the basic test required to justify regulating. Based on the limited information publicly available, EBSA's justification for a new regulation reversing the status quo is intended to: (1) save plan fiduciaries money because electronic disclosure is cheaper than

⁷ FINRA Investor Education Foundation, *Investors in the United States 2016*, Financial Industry Regulatory Authority, Inc. (Dec. 2016); Annual Report and Semi-Annual Report Notification Study: Understanding the impact of providing investors with mutual fund and ETF report notifications, True North Market Insights (June 2015); Investor Testing of Mutual Fund Shareholder Reports, Siegel & Gale Report to the SEC (2011; Revised: 2012); How Might the Proposed Rule on Accessing Annual and Semiannual Mutual Fund Reports Affect Investor Behavior, Forrester Consulting on Behalf of Broadridge Financial Solutions, Inc. (2015); AARP Research Paper by Choice: People of All Ages Prefer to Receive Retirement Plan Information on Paper, Social Science Research Solutions on behalf of AARP (Nov. 2012).

⁸ "The Reading Brain in the Digital Age: The Science of Paper versus Screens," *Scientific American*, (April 11, 2013).

⁹ Pew Research Center: "Digital gap between rural and nonrural America persists," (May 31, 2019).

paper disclosure; and (2) would make these important disclosures “more understandable and useful.”¹⁰

While saving administrative costs for fiduciaries is a relevant factor to consider, it is *insufficient to justify a regulation*. The longstanding principle since President Reagan’s Executive Order 12291 is that, unless statutory language requires otherwise, agencies may only regulate if it will do more good than harm and maximize net benefits to the public. It is evident that EBSA cannot meet this basic test to regulate for many reasons, including:

- EBSA fails to consider the benefits of paper-based information, including security, readability, and universal access.
- EBSA fails to demonstrate that it has knowledge superior to the collective judgment of millions of workers and retirees that it is better for them to receive their important and sensitive retirement plan disclosures in electronic form rather than paper form.
- EBSA fails to demonstrate that, notwithstanding their choice not to opt-in to electronic information, workers and retirees actually prefer to have the default switched from paper to electronic information. In other words, *EBSA fails to provide sufficient and compelling evidence to justify reversing the current default rule for paper-based information*.

Unsubstantiated assertions that electronic delivery of information will “make these disclosures more understandable and useful for participants and beneficiaries” do not justify reversing the status quo. Citizens comfortable with technology may find electronic disclosures more useful, but the majority who currently receive this information in printed form evidently do not agree.

EBSA’s Regulation Would Undermine a Fundamental Statutory Duty of Fiduciaries

One fundamental statutory duty of retirement plan fiduciaries is to keep workers and retirees informed about their retirement plans. Unfortunately, millions of Americans without internet access or ready access to robust internet services may never see these notices again. It is up to them, after all, to switch back to paper delivery once the proposed rule is in place. And if they miss the notice, fail to check an online account, or do not see a notice in their spam filter, they may never see retirement plan disclosures again. This fundamental statutory obligation to disclose important financial information to plan participants should not be undermined to save fiduciaries relatively minor administrative costs.

Under longstanding principles for regulatory planning and review, the burden of proof to justify new regulation is on EBSA, not on members of the public who will be adversely affected by its action.

¹⁰ See Unified Regulatory Agenda, DOL/EBSA, “Improving Effectiveness of and Reducing the Cost of Furnishing Required Notices and Disclosures,” RIN 1210-AB90 (Spring 2019).



Because EBSA has not met its burden of proof to regulate, DOL should postpone consideration of the proposed rule and proceed with conducting evidence-based research on the questions raised by Executive Order 13847 before moving forward.

Respectfully,

The Coalition for Paper Options

Members include:

American Postal Workers Union
Coalition for Paper Options
Consumer Action
EMA
Domtar Corp.
Hallmark
International Paper
National Association of Letter Carriers
National Consumers League
National Grange
National Rural Letter Carriers Assoc.
Pension Rights Center
Printing Industries of America
The American Forest & Paper Assoc.