



November 22, 2019

The Honorable Eugene Scalia
Secretary
US Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

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

Dear Secretary Scalia:

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.

We respectfully offer the following comments as to why the proposed rule should be rejected.

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 overlooked this part of the order 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 Evidence-Based Research

Instead of sound evidence-based research to validate its conclusion, the arguments the Department put forward simply mirror the rationale offered by the financial services industry when it argued in favor of the RETIRE Act in the last Congress.

Survey research on this topic would have revealed a difference between access to the internet and a very strong 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. Attempts to eliminate it by forcing people to access services via the internet before they are ready, will not likely be successful. 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. The Department 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.

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. At its peak, the SSA mailed over 150 million statements to citizens that enabled them to validate their recorded earnings and better understand their expected retirement benefits. This statement is likely the single most important financial planning tool most Americans will ever see, and it went away overnight.

The DOL proposal cites the fact that in 2018, 17 million registered users of the SSA’s new online tool checked their statements online through the My Social Security portal. Compared to the 150 million wage earners who used to see this form on paper, these results illustrate the dramatic negative impact of mandated e-delivery. 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

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

incalculable. Rather than validating the wisdom of mandated e-delivery, the SSA's experience should warn other agencies against a similar approach.

The My Social 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 someone thought forced e-delivery would be effective.

Similarly, the 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 shares by 75% and has, according to the Conference Board⁴, 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.

DOL Admits it Doesn't Have Adequate Data for Key Populations

The proposed rule contains a discussion of adverse impacts. Unfortunately, the proposed rule admits that the DOL does “not have sufficient data to quantify...the negative impacts, which most likely would be borne disproportionately by demographics such as the low-income, the elderly and workers in rural areas.” It goes on to suggest that if these adverse impacts occur, “plan administrators might (emphasis added) take steps to limit their impact...”

Adequate research has not been conducted to understand the potential for adverse impacts and DOL seems to be content to rely on plan administrators to voluntarily take steps to mitigate them.

CPO believes this research should have been done prior to the issuance of the proposed rule and that the rule should not move forward until such research is completed. Efforts to mitigate adverse impacts should be mandatory, not voluntary.

The 30-Day Comment Period is Inadequate

The proposed rule contains more than 40 separate requests for comments and information. Few organizations can provide the kind of detailed response merited within a short 30-day comment period. A significant rule of this kind deserves a comment period of at least 60 and perhaps 90 days.

⁴ Fabio Saccone, E-Proxy Reform, Activism, and the Decline in Retail Shareholder Voting, The Conference Board (Dec. 2010)

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

There has not been a “market failure” that justifies this regulation. 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,” such as “material failures of private markets.” E.O. 12866, Sec. 1(a).⁵

Under the status quo, consumers who prefer their retirement plan disclosures on paper have their preference honored, and consumers who prefer electronic disclosure can opt in to electronic delivery. E-Delivery has been growing steadily as citizens become more adept at technology. Citizens who prefer electronic information are taking this option, while others continue their preference for paper-based disclosures. In any event, the current system is working. There is simply no compelling evidence we have seen 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.⁶
- Studies indicate reading comprehension improves with paper-based information.⁷
- Broadband access remains sparse in many areas of the country.⁸
- 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

⁵ 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).

⁶ 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).

⁷ “The Reading Brain in the Digital Age: The Science of Paper versus Screens,” *Scientific American*, (April 11, 2013).

⁸ Pew Research Center: “Digital gap between rural and nonrural America persists,” (May 31, 2019).

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 paper disclosure; and (2) would make these important disclosures “more understandable and useful.”⁹

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 take into account 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

The fundamental statutory duty of retirement plan fiduciaries is to keep workers and retirees informed about their retirement plans. Unfortunately, millions of Americans without interest in 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

⁹ See Unified Regulatory Agenda, DOL/EBSA, “Improving Effectiveness of and Reducing the Cost of Furnishing Required Notices and Disclosures,” RIN 1210-AB90 (Spring 2019).



the notice, fail to check an online account, or don't 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.

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,

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.
Printing Industries of America
The American Forest & Paper Assoc.
Twin Rivers Paper