March 8, 2021

Ali Khawar, Principal Deputy Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW, Suite S-2524
Washington, D.C. 20210

Re: RIN 1210-AB90, Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA[1]

Dear Principal Deputy Assistant Secretary Khawar:

The undersigned organizations urge the Department of Labor (DOL) to undertake a rulemaking to address the severe shortcomings in the Department's recently adopted "Notice-and-Access" rule and to ensure adequate protections for workers and retirees regarding retirement plan disclosures.

Disclosures and notices sent by retirement plans to workers and retirees play a critical role in helping them plan for retirement and enforce their rights. These disclosures include: the rules by which the plan operates and the worker earns benefits; disclosures on participation and the amount of benefits earned; and disclosures that enable plan participants to watchdog the plan and ensure it is being operated to benefit them rather than the employer or the recordkeeper.

DOL has long understood the importance of these plan disclosures to the retirement security of millions of workers and retirees. That is why the agency wisely interpreted ERISA to require plan administrators to undertake efforts reasonably calculated to ensure their *actual receipt* by participants, beneficiaries, and alternate payees (e.g., former spouses under qualified domestic relations orders (QDROs)). Until the changes last May, the default had been to deliver disclosures on paper, sent through the mail. This common sense rule allowed for electronic delivery to be the default – a default from which the consumer may opt out – only if the worker regularly uses a computer at work (and thus can access the electronic disclosures), or the worker/retiree has made an affirmative choice to elect electronic delivery.

The issue in DOL's latest rulemaking – and the concern of the undersigned organizations – is not whether electronic delivery is an acceptable option to make available to consumers. We have supported the availability of electronic delivery for those who prefer electronic delivery of disclosures. Nor is the issue whether some tools and information available on financial industry websites might be helpful in encouraging workers to save and plan for retirement. These tools remain available and can be used anytime by those who have internet access; they have nothing to do with how legally required disclosures should be delivered.

The main issue at stake here is opt-in vs. opt-out – *what default works best to protect workers and retirees*. The notice-and-access rule adopted by DOL last summer abolishes the actual receipt standard, and replaces it with a rule structured to *minimize* the chances that workers and retirees

[1] 85 Fed. Reg. 31884, 31922-31924 (May 27, 2020) (to be codified at 29 C.F.R. § 2520.104b–31(a)-(l)).

will actually receive important disclosures. Under the new rule's default, the plan's obligations to furnish disclosures begins and ends with sending an email or text message to a consumer letting them know that a disclosure is available on a website. The entire onus of noticing the electronic alert, logging in and finding the document on the website, and printing it out for future documentation is shifted from the plan to the worker/retiree.

Notice-and-access goes well beyond, and is far more anti-consumer than, simple electronic delivery of a document like receiving a PDF attachment in an email. Contrary to the body of research by behavioral economists to make defaults work to promote desired goals, the rule uses the force of inertia *against* the retirement security interests of consumers – "automatically enrolling" them in a disclosure regime that will discourage them from receiving, reading or preserving the documents.

Moreover, the rule makes no provision for the sizeable proportion of individuals who still don't have ready access to computers or internet service,[2] or the millions who can only access the internet on their smartphones,[3] devices wholly unsuitable for reading complex financial documents or for saving and printing them for the future. The rule purports to provide a right to opt out and receive paper disclosures, but then throws several obstacles in the way of exercising that right.

In short, the new disclosure rule makes it much harder for ordinary Americans to get the information needed to plan for retirement and enforce their rights. It shifts the costs, and the legal risks of nonreceipt and disappearance of disclosures, from plans to workers and retirees, yet they gain *no benefit* from this rule that they could not have received from an opt-in system with free choice to go paperless. Please make it a priority to propose and adopt major revisions to this rule as soon as possible.[4]

Sincerely,

Pension Rights Center
AARP
American Forest & Paper Association
Consumer Action
Consumer Federation of America
Domtar
EMA
Keep Me Posted
National Consumer Law Center (on behalf of its low-income clients)
National Consumers League
National Employment Law Project
National Employment Lawyers Association
National Grange
National Nurses United
National Organization for Women
National Retiree Legislative Network
Public Citizen
Social Security Works
United Steelworkers

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[2] *See* Pew Research Center, *Internet/Broadband Fact Sheet,* "Chart: Who Has Home Broadband" and "Chart: Who Uses the Internet" (June 12, 2019), *at* https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.
[3] *See* Pew Research Center, *Mobile Fact Sheet*, "Chart: Who Is Smartphone Dependent," *at* https://www.pewresearch.org/internet/fact-sheet/mobile/.
[4] As a first step, DOL should immediately countermand a statement made by the Assistant Secretary at an industry conference allowing administrators to ignore the new rule's requirement that all participants receive an initial paper notice informing them of their rights, and should instead affirmatively state that an initial paper notice is still required before the safe harbor applies. *See* 29 C.F.R. § 2520.104b–1(g).