PUBLIC SUBMISSION

Docket: EBSA-2019-0005
Default Electronic Disclosure by Employee Pension Benefit Plans under Employee Retirement Income Security Act

Comment On: EBSA-2019-0005-0001
Default Electronic Disclosure by Employee Pension Benefit Plans under Employee Retirement Income Security Act

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Submitter Information

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General Comment

RE: Default Electronic Disclosure by Employee
Benefit Pension Plans under ERISA
EBSA-2019-0005

I have been an employee benefits and ERISA attorney for over 35 years, and have been counsel to single and multi-employer plans providing pension, and other benefits. The plans I have represented have been as large as 100,000with assets as high as $2 billion or as small as 25 participants.

Presently, I represent plan participants in all sorts of employee benefit matters, including claims for pension, medical, and disability benefits in the plan's administrative procedures and in the US District Courts and the Second Circuit.

In addition to my litigation experience, I have been active in the Employee Benefits Committee of the Labor Sectionof the American Bar Association. I was a Co-Chair of the Labor Section's Employee Benefits Committee, and co-chaired various subcommittees. I am a past Chair of the ABA's Joint Committee of Employee Benefit Committee (JCEB).

I am submitting this comment on the proposed regulations electronically that will permit

401(k)plans to provide information electronically because it will be more efficient and save the plans approximately billions of dollars over the next 10 years. My concern is that many participants of these plans do not own or have ready access to computers, and that they will have to go to public and unsecure computers to obtain plan information about the status and value of their benefits. Unfortunately, public computer space is neither private nor secure and these documents are not easily understood by an average plan participant.

Our current experience is that participant identity and the benefits themselves are highly vulnerable to cyber theft. The NY Regional Office of EBSA has stated that they receive more complaints that 401(k) benefits have been stolen than any other type of benefit and the chances of recovery are limited if there is a delay in the discovery of the thefts.

We also known from the Report of the Office of the Chief Accountant, EBSA, Assessing the Quality of Employee Benefit Plan Audits, May, 2015, that the largest Audit Deficiencies, after Internal Controls, were in the areas of Contributions Received, Benefit Payments, and Participant Data, Id., Appendix II, page 27. These deficiencies create, potentially, significant plan exposure for defective internal controls and cyber theft.

The proposed Regulations need to re-examined because they seem to limit participants, former employees, and retirees to reasonable access to the documents if they do not own or have computers and printers. (Given the complexity and size of the documents typically involved, smart phones should not be considered as computers in this context because of the small size of the screens and the type fonts.)

It seems to me that one of the ways this issue could be partially solved, if plans want to take advantage of the electronic notification and the concomitant savings, would be to require plan sponsors to provide secure and private computer space for active employee/participants to use on their own time for plan benefit purposes. I think the cost would be negligible and would allow participants to speak directly to plan representatives if they had any questions or felt that the plan information was incorrect.

My own experience from both sides of the table is that the sooner data issues are identified, errors are more easily and accurately corrected. If participants are forced to wait until retirement, the underlying data may no longer exist or employers may no longer be in business to correct the errors. I also suggest that the Agency contact its Regional Offices and discuss these issues with their investigators who confront these issues on a daily basis

Currently, we require plans to have plan documents available to plan participants on site, why not extend that concept to require plan computers at the plan sponsor's and/or plan administrator's offices if the plans are required to use electronic notification.