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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Submitted electronically to:
Federal eRulemaking Portal: https:www.regulations.gov

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

The Pension Rights Center appreciates the opportunity to comment on the Labor Department's proposed "notice and access" safe harbor rule for delivery of participant disclosures under ERISA.[1] The Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers, retirees and their families.

Introduction

Each year thousands of individuals come to the Pension Rights Center and the six government-funded regional pension counseling projects we work with around the country seeking help in obtaining the retirement benefits they have earned. In many, if not most, of the situations brought to our attention, paper documents are key to proving benefit entitlement. Most commonly, these include individual benefit statements, deferred vested statements and summary plan descriptions. Often the individuals only looked at these documents as they approached retirement age. Until then the documents were saved in drawers, boxes, attics or basements.

[1] Such a dramatic change in disclosure delivery for participants requires more than a 30-day comment period.

As we discuss below, the proposed notice and access safe harbor would make it impossible for many counseling project clients and others who must rely on paper documents to establish their rights to pension benefits.[2] For people in 401(k) and other retirement savings plans, the proposed rule would make it exceedingly difficult to understand and compare their investment options and the fees they are being charged, and to monitor their funds.[3]

The current safe harbor rule for electronic delivery of required participant disclosures allows plans to provide electronic delivery of documents to people who regularly work with computers or who request electronic delivery. All others must receive required disclosures on paper by mail. The current safe harbor reflects a common-sense balance between the interests of plans in saving money and the interests of current and future retirees in receiving information that will be critical to their retirement security.

The proposed disclosure delivery scheme of "notice and access" is deeply flawed and will not deliver the disclosures that retirement plan participants are legally entitled to receive under the Employee Retirement Income Security Act of 1974 (ERISA). The Pension Rights Center recommends that the Labor Department withdraw the proposed rule and reconsider how to streamline ERISA disclosures without causing grave harm to participants.

I. ***The Pension Rights Center strongly objects to the proposed "notice and access" delivery method in the proposed safe harbor which will harm many participants, particularly the most vulnerable populations, who are expected to understand their retirement plans and make good choices to ensure a secure retirement for themselves and their families.*** It does little good to establish careful and prudent rules for the content of plan disclosures when the method of delivery for required information will make that information less accessible, if not inaccessible, to many participants and beneficiaries.

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[2] According to the Census Bureau's National Compensation Survey for 2019, 26 percent of private sector workers who participate in an employer-sponsored retirement plan participate in a defined benefit pension plan. http://www.pensionrights.org/publications/statistic/how-many-american-workers-participate-workplace-retirement-plans

[3] The inadequacy of a "notice and access" approach applied to retirement savings plans will be litigated next month when the U.S. Supreme Court hears oral argument in *Intel Corporation Investment Policy Committee v. Sulyma*. S. Ct. No. 18-1116 (S.Ct.). In that case, the participant received an e-mail notice that said that information about his defined contribution plans could be found by clicking on a link to a website. The website provided fact sheets showing that his plans were heavily invested in hedge funds and other risky investments. The participant only learned about the fact sheets after the plans lost large amounts of money. Intel took the position that the participant had "actual knowledge" of the information when he received the e-mail notice telling him that he had access to the website and that, therefore, his lawsuit was not timely because he had not filed it within three years of that date.

Participants, retirees and their families are the prime "stakeholders" in employer-sponsored ERISA retirement plans. Under ERISA these plans are established and maintained for the benefit of participants and their beneficiaries to provide a secure and predictable retirement. Plan sponsors and administrators have a fiduciary duty to operate ERISA plans in the interests of participants and beneficiaries. Adopting a method of delivery that could exclude, or at a minimum substantially burden, significant numbers of participants is not in the interest of those participants. This proposal will also be harmful to spouses and other beneficiaries.

The current disclosure system makes paper disclosures delivered by mail the default mode of delivery, with some carefully targeted exceptions.[4] This system ensures that participants and beneficiaries will receive important plan information on paper by mail. The information delivered includes a description of the plan and how it works, rules of the plan concerning vesting, investment choices, spousal rights and how to claim benefits at retirement.

II. ***The ERISA regulatory standard for disclosure to plan participants and beneficiaries states that to fulfill the disclosure obligation the "plan administrator shall use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals." [5] The proposed "notice and access" rule fails to meet that standard.***

"Notice and access" is not the same as an electronic default scheme. Typically, under an electronic default scheme a participant is provided with the same information as a paper document except it is delivered by e-mail. A participant receiving the e-mail can see the required disclosure in the e-mail or download the disclosure. "Notice and access" requires that a participant read an e-mail or text and then go to the website on the internet. The website could require a log-in code and password to access the right information. Under "notice and access" there is no way to find out whether a participant actually found the information or visited the named website. In all likelihood many participants will fail to make the additional effort to seek out a website and take all the necessary steps to then find the disclosure within the website. This proposed rule "deems" that "notice and access" meets the ERISA standard. We disagree.

[4] 29 CFR 2520.104b-1.
[5] 29 CFR 2520.104b-1(b)(1). "Fulfilling the disclosure obligation."

III. *The many problems with the proposed safe harbor*

Covered Individuals

The proposed safe harbor permits delivery of required ERISA disclosure information to "covered individuals." Covered individuals are defined as participants and other individuals who, as a condition of employment or otherwise, provide an e-mail address or smartphone number to the employer. Participants or beneficiaries without an e-mail address can be assigned an address by the employer.[6] Under the proposed rule the individual with the assigned address is deemed to have provided the address voluntarily.

The proposed rule contains no limits or restrictions on employers who assign an e-mail address, such as confirming that the person has access to a computer or smartphone. Nothing in the safe harbor prohibits an employer from assigning an e-mail address to an individual who must go to a library to read e-mails. There is no requirement to confirm that an e-mail is opened. There is no requirement for a separate e-mail address or PINs for spouses or former spouses. The "special rule for severance from employment" just says that the administrator must take measures reasonably calculated to ensure accuracy of the electronic address or obtain a new electronic address. "Reasonably" is not defined. Plans have difficulty keeping track of regular post office addresses for former employees and beneficiaries. How much harder will it be to keep track of e-mail addresses?

Employers who assign e-mail addresses to participants are not required to consider the costs of buying and maintaining the hardware, software and internet service for a computer or smartphone.

Default systems and opt-out problems

Behavioral economics has shown that individuals presented with a default option usually keep the default and do not elect to change it. This is the basis for new retirement plan features such as automatic enrollment and automatic escalation of contribution amounts. These automatic plan features count on inertia and are considered beneficial because individuals are unlikely to

[6] The proposed rule completely reverses prior guidance contained in Technical Release 2011-03R that required voluntary provision of an e-mail address. "If the provision of an e-mail address is a condition of employment or participation in the plan, such e-mail address shall not be treated as being provided voluntarily."[6] The Technical Release contains an exception for access to a continuous access website that has information on plan investments under Sec. 2550.404a-5. However, this proposed "notice and access" rule permits employers to assign an e-mail address for any disclosure under the plan.

change a default. And they have proven to be successful in increasing retirement plan participation.

However, this default notice and access disclosure proposal will work against participants and beneficiaries. Individuals with few computer skills and inadequate electronic devices are expected to read and understand retirement plan information vital to their futures. Moreover, there is no easy way to retain the information provided.

This proposal includes only one paper notice of the right to opt-out and receive paper copies. The paper notice is provided when a participant joins the plan, presumably at the same time a new employer is asking for an e-mail address. The rights to opt-out of electronic delivery completely and to request a paper copy of the specific disclosure must be included in each electronic notice of internet availability, but there are no standards beyond reasonable procedures regarding how a participant or beneficiary can exercise the rights to paper. There is no requirement that statements of rights to paper be at the beginning, and not the end, of the notice of availability or be prominently displayed. Additionally, the rule requires a contact phone number but does not specify that the phone number relate to requests for paper delivery. Moreover, the contact phone number could direct a caller to a plan representative who is neither the plan administrator nor the employer. **There is no requirement for a toll-free number.**

Website Searches

Once a participant or beneficiary receives an e-mail notice that retirement information is posted on a website, the individual must go to the website and search for the required information. The website can require a separate password or login identifier. All these search-and-locate steps, which will be necessary to actually get to a plan disclosure required by law and regulation, will make it harder for typical individuals to actually find the information.[7] The more obstacles a participant encounters, the less likely it is that the participant will actually reach the required disclosure. Websites can be very complicated with multiple choices not easily understood. Financial websites are particularly difficult to read.

When an individual finds the required disclosure on a website, the individual must be able to read it. **Complex retirement plan information cannot be read and understood on a three-by-six-inch smartphone.** A smartphone may be fine for ordering pizza or viewing a bank balance, but it is woefully inadequate when attempting to view complex retirement plan provisions from a website. For example, the annual fee and investment information that must be disclosed to participants in self-directed 401(k) plans includes descriptions of investment choices, operating

[7] In contrast, all notices must be written in a manner calculated to be understood by a typical participant.

expenses, descriptions and amounts of shareholder fees not otherwise reported. Additionally, the required information must be presented in a comparative chart. Viewing such a chart on a small screen will be all but impossible.[8] Similarly, a multi-page summary plan description cannot be viewed and understood on a tiny screen. **There is no easy way to print website information from a smart phone. A website disclosure of a benefit statement may be viewed from a smartphone, but not printed for future reference without special applications and access to a printing device.**

The proposal permits service providers to include logos with the website information. We question the advisability of this permission. It could appear to an innocent participant that the employer is endorsing a particular financial institution. There is no need for advertising to participants in employee benefit plans under ERISA.

Recordkeeping

A secure retirement requires good planning. **The ability to keep retirement plan information can be crucial to understanding rights and obligations under plan rules and to making claims for benefits.** Participants who leave a job before retirement age need documentation to later show their rights to benefits. Surviving spouses and beneficiaries also may need to locate plan information. While website information must be available in a form that can be printed, participants using smartphones to read a document could find they will be unable to print it without special applications and a printing device.

The proposed safe harbor would permit plans to delete information from the website when new information is provided. There is no requirement to maintain records in an archive. Nor is there a requirement to notify participants when information will be deleted. For example, a quarterly pension benefit statement for a participant in a self-directed 401(k) plan will be superseded every three months, leaving the participant with no way to access earlier statements to compare changes in fees or investment returns.

All prior versions of plan disclosures should be available on the website in an archive with the ability for participants and beneficiaries to access the disclosures in the archive decades later. All participants should be notified if and when old disclosures are deleted and given the option to request paper copies.

[8] Pension Rights Center, 401(k) Fee Disclosure: Investment-Related Information. http://www.pensionrights.org/issues/regulations/401k-fee-disclosure-investment-related-information

Combination of Notices

This proposal permits combining notices of internet availability for required disclosures that have different timing requirements. This should not be permitted. Thus, a notice for a plan year disclosure could be combined with a notice about a summary of material modifications which should be delivered with 210 days of adoption. Summary plan descriptions and individual benefit statements are crucial documents for participants and should not be combined with any other disclosures. **Importantly, participants in self-directed 401(k) plans under this proposal could receive only one notice a year for their quarterly statements. Even though the statements are put on the website quarterly as required, the notice of availability, which includes the right to paper copies, would be given only once a year. We question whether this provision meets the requirements of the law to furnish quarterly statements.**

Internet Use

Required disclosures delivered by the US Postal Service on paper do not require special devices for receipt. The individual receiving disclosures by mail does not need to do anything except collect the mail from the box. Delivery is a function of the US Government. These disclosures may be set aside for future reading or reference. They may be stored for years until it is time to claim retirement benefits. Mail is returned to the sender when a postal address is incorrect.

This proposed notice and access scheme turns delivery on its head. The recipient must have a device, either smartphone or computer to receive required information. While ownership of internet-connected devices is increasing, there are still significant gaps. Pew Research reports that almost 20% of U.S. adults do not have a smartphone and 27% do not have a home computer. These individuals are more likely to be older, minorities, have less education and lower incomes. Among adults aged 50 to 64, crucial years for planning retirement and making retirement decisions, only 79% have smartphones and home computers. PEW Research reports that 17 percent of U.S. adults are smartphone dependent, without access to a traditional computer. One-in-four lower-income adults are smartphone dependent.[9]

Costs

This proposed safe harbor fails to mention that participants incur real costs to buy and maintain electronic equipment. Monthly fees are charged for internet service to computers and smartphones. Additionally, electronic devices require periodic and costly upgrades. The proposed rule discusses the "costs" of paper delivery but fails to note that costs of delivery in

[9] Mobile Technology and Home Broadband 2019, Pew Research Center, June 13, 2019. https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/

401(k) plans are already principally charged to participant accounts. When considered on a per person basis the costs to participants of paper delivery are minimal.

The proposal also fails to include the significant costs to participants of this notice and access delivery system which can make it difficult for participants to find the information needed to make wise choices for retirement or even to preserve plan information and records that will become necessary to later prove their rights to retirement benefits. These costs to participants are significant.

IV. *The proposal lacks protections for participants and beneficiaries*

Despite the obvious problems of this "notice and access" scheme, the proposed rule fails to include many of the standard protections for participants. The proposal –

- Does NOT require all notices of availability to include a toll-free number for a request to opt-out of all electronic disclosures or to request a paper copy of a disclosure.

- Does NOT specify that contact phone numbers be directed only to employers or plan administrators.

- Does NOT include a statement that participants should not have to go to a library or other public place in order to access required disclosures.

- Does NOT require paper notices of availability of documents, unlike recent SEC and TSP procedures. The SEC requires a paper notice of availability when shareholder reports are posted on a website.[10] The Federal Thrift Savings Plan provides an annual statement on paper summarizing account activity for the year, even to participants who otherwise get their information electronically.[11]

- Does NOT require an annual paper notice offering participants the option to change defaults similar to that required by the RETIRE Act (Receiving Electronic Statements to Improve Retiree Earnings Act) H.R. 4610.[12]

[10] See SEC electronic disclosure rule issued June 5, 2018, 17 CFR 230.498(b)(1)(vii). https://www.law.cornell.edu/cfr/text/17/230.498

[11] See Thrift Savings Plan Annual Statement. https://www.tsp.gov/PlanParticipation/AccountManagement/managing/participantStatements.html

[12] https://www.congress.gov/bill/115th-congress/house-bill/4610

- Does NOT specify how quickly paper disclosures must be sent when requested. The SEC requires delivery of requested documents within three days.

- Does NOT include monitoring the delivery system to ensure e-mails are received. TR 2011-03R requires monitoring such as return receipt or notices of undelivered mail, periodic reviews and surveys to confirm receipt.

- Does NOT attempt to limit the number of steps a person must make to actually get to the specific disclosure.

- Does NOT factor in the monthly costs of maintaining smartphones and computers and periodic costs of upgrades in assessing the costs of the proposal.

- Does NOT exclude separated and retired persons from its definition of Covered Individuals.

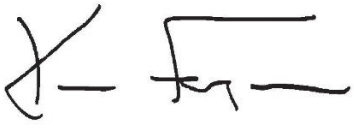
- Does NOT require the inclusion of a phone number for the Labor Department and a statement that the notice should be printed and saved for your records.

- Does NOT mention triggering events and the need for prompt action when they occur or how promptly paper copies must be provided for triggering events when requested.

Conclusion

The proposed notice and access safe harbor would shift the costs and burdens of delivery for required disclosures to participants and beneficiaries. The burdens imposed on participants by this scheme would cause many to miss disclosures crucial for retirement planning and vital to establishing their rights to benefits at retirement. **The Pension Rights Center recommends that the Labor Department withdraw this flawed proposal for delivery of required disclosures and reconsider how to streamline ERISA disclosures without causing grave harm to participants and beneficiaries.**

Respectfully submitted,



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