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November 22, 2019

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

RE: **Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA**
RIN 1210–AB90

To Whom It May Concern:

The Pension Action Center (PAC) is a free legal services program that helps older Americans obtain the pension benefits they have earned. PAC's attorneys and trained volunteers operate a free helpline and provide free counseling and advocacy. Since our founding in 1994, we have helped over 9000 workers and retirees. PAC serves an area that includes the six New England states and Illinois. PAC is part of the Gerontology Institute at the University of Massachusetts Boston.

Millions of older Americans depend on qualified retirement plans to provide them with critical financial support. Indeed, these products are marketed to Americans of all ages with the promise that they will provide support many years in the future, past the age of 65, and beyond. Any changes to the regulations protecting retirement plan participants must take account of the unique characteristics of older Americans, including the potential for declining physical and cognitive health that can impede participants' ability to access, or continue accessing, digital technologies as they age. Someone who is fully "wired" when he or she retires at age 65 will not necessarily maintain their internet connectivity throughout the rest of their life.

We are writing today because we have deep concerns about the proposed regulation on Default Electronic Disclosure, which would undermine the retirement security of millions of workers and retirees who depend on their paper retirement disclosures to enable them to enforce their rights. It is our belief that the new regulation will have the effect of cutting off many Americans from the retirement benefits that they have worked for years to earn.

PAC asks each person who contacts our helpline whether they have an email address that we can use to communicate with them. Of those people who contacted PAC for help between January 2014 and the present, 40% reported that they do not have an email address.

Access to the internet is not uniform or equitable. Studies show that access to the internet and broadband still varies substantially by education, age, income, and geography. Making a new form of electronic delivery the default means of delivering retirement information would effectively weaken consumer protections for participants and beneficiaries, the very people whom the disclosures are intended to protect.

ERISA requires administrators of retirement plans to furnish several understandable, important disclosures to workers, retirees and spouses so that they know their rights, know what benefits they're entitled to, are aware of the fees they're being charged, and can discern whether the plan is being managed to protect their interests. These disclosures are critical to helping workers plan for and achieve retirement security.

Currently, longstanding regulations require plans to furnish disclosures and take steps to ensure actual receipt by participants and beneficiaries. Generally, plans must send paper disclosures by mail as the default means of delivery to participants if they do not regularly work at computers, but can offer consumers the choice to opt in to electronic delivery. This system of delivery has worked well to ensure that a majority of consumers automatically receive paper – the more reliable method of delivery – and those who prefer to receive information electronically may do so.

However, DOL's new proposed regulation would institute a new disclosure delivery system called "notice and access" that reverses the system from one of actual receipt of the default of paper disclosures sent by mail to a default system of electronic hide and seek. Under this new system, plans would not even need to send an electronic version of the disclosure to the consumer. They would only need to electronically notify (by email, text, phone, etc.) the participant that a disclosure document is available on a website. Then the burden would entirely fall on the participant or beneficiary to take the many steps involved in finding it. The proposal also fails to provide adequate consumer protections, regardless of which delivery method is used.

The proposed rule contemplates that any deficiencies in its proposal are mitigated by its provisions enabling participants and beneficiaries to receive a one-time initial paper disclosure informing them of their ability to "globally" opt out of all electronic disclosures by making a telephone call. They can also request a paper version of specific documents. But there are no requirements for how the opt-out process will work, or whether the significance of the failure to opt out must be adequately explained.

The proposed regulation for "Notice and Access" has next to no protections to ensure that individuals actually receive these disclosures:

- **The proposed regulation allows notice by any technology**: There is no requirement to use email. Plans would be allowed to notify consumers of the availability of a disclosure with a text message or email, neither of which are verifiable or easily preserved.
- **No actual receipt required**: There is no requirement whatsoever that the administrator confirm that an email notice was actually opened by the recipient. Thus, if the email goes to a spam folder, or gets buried or misfiled, the recipient never actually receives the notice or the disclosure. Nor is there any requirement that the recipient actually have accessed the document. This is despite the fact that both actions are easily determined by the plan administrator with this technology. This is particularly troubling because retirement products are intended to protect financial security as people age, which is also a time in their lives when new physical or cognitive impairments might impair internet access. As noted above, someone who is fully "wired" at age 65 will not necessarily maintain their internet connectivity throughout the rest of their life. The proposed rule does not account for this.
- **The ability to get information on websites is an Alice in Wonderland scenario**: The proposed rule will send retirees down the rabbit hole in search of information. Consumers should not be forced to wade through marketing communications or several webpages in order to find the disclosures.
- **Spousal rights not adequately protected**: The proposed rule makes no exception for important action documents that are currently required to be in writing, such as notices to spouses of their right to a survivor annuity and that their consent is required to waive that right.

Finally, this proposal shares none of the cost savings with consumers, shifting substantial new costs onto them instead. According to the regulatory analysis, this new framework will save plans $2.4 billion over 10 years. Yet, this proposed regulation imposes absolutely no requirement for plans to pass on those savings to consumers, e.g., by adding to the pension fund corpus, or by reducing fees. It simply shifts costs to current and future retirees by requiring them to purchase and maintain internet access and the hardware, software, and supplies needed to access disclosures. That is deeply unfair.

The proposed rule's framework and the specifics of the proposal impose all of the disadvantages of technology, but confer none of its advantages, for the benefit of participants and beneficiaries. This proposal should be withdrawn, or at least extensively overhauled to ensure actual receipt of disclosures and adequate consumer protections, including for the older Americans who rely on retirement accounts to support their financial well-being.

Thank you for your consideration of these comments.

Sincerely,

Anna-Marie Tabor
Director, Pension Action Center