



*The National Voice for Direct-Care RNs*

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*Via Federal Register*

November 22, 2019

Preston Rutledge, Assistant Secretary of Labor  
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**

Dear Assistant Secretary Rutledge:

On behalf of more than 150,000 registered nurses (RNs) across the country, National Nurses United (NNU) submits these comments in response to the Department of Labor's (Department) proposed rule "Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA", 84 Fed. Reg. 56,894 (Oct. 23, 2019) (Proposed Rule). NNU believes that workers and beneficiaries who have accrued benefits under and paid into employee retirement benefits plans deserve to know important information about and changes to these accrued retirement benefits. Indeed, the law obligates plan administrators to ensure that plan participants and beneficiaries actually receive such disclosures and notices. The Department's Proposed Rule, however, does not protect such rights of participants and beneficiaries to actually receive such disclosures and notices from plan administrators. The Proposed Rule, rather, would establish a default electronic disclosure framework that would substantially weaken protections for the very people whom the disclosures are intended to protect. For this reason and for the reasons detailed below, NNU opposes the Proposed Rule and strongly urges the Department to withdraw the Proposed Rule.

**I. The Proposed Electronic "Notice & Access" Framework Is Inadequate to Accomplish ERISA's Mandates.**

The electronic disclosure (E-Disclosure) regime being proposed by the Department in the Proposed Rule,<sup>1</sup> which would cover both defined benefit (traditional-style pensions) and defined contribution plans (like 401(k)s), reverses the default from paper disclosures sent by mail to a

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<sup>1</sup> Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA", 84 Fed. Reg. 56,894 (Oct. 23, 2019) (Proposed Rule), available at <https://www.govinfo.gov/content/pkg/FR-2019-10-23/pdf/2019-22901.pdf>. The Proposed Rule also contains a Request for Information on how to simplify retirement-related disclosures and make them more effective. It is unreasonable to piggyback such an important, and separate, issue on to a notice of proposed rulemaking that threatens protections for consumers, all in 30-day comment period.

system of electronic hide and seek. Longstanding regulations require administrators of retirement plans to *furnish* certain disclosures, which are critical to helping workers plan for and achieve retirement security,<sup>2</sup> and take steps to ensure *actual receipt* of such disclosures by participants and beneficiaries. Unlike current requirements for electronic disclosures, however, the electronic disclosure (E-Disclosure) in the Proposed Rule provides next to no protections to ensure that individuals *actually receive* these important disclosures.

Notice of disclosure is not an adequate substitute of actual disclosure by plans as required under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA requires that plans furnish several understandable, important disclosures to plan participants and beneficiaries (e.g., surviving spouses) so that they know their rights, know what benefits they are entitled to, are aware of the fees they are being charged, and can monitor that the plan is being managed to protect their interests. Plans must send paper disclosures by mail as the default means of delivery, but can offer consumers the choice to *opt in* to electronic delivery.<sup>3</sup> Under the new system of “notice and access,” however, plans would not even need to send an electronic version of the disclosure to the consumer. Plans would only need to electronically notify (by email, text, phone, etc.) the participant that a disclosure document is available on a website, which places the burden entirely fall on the participant or beneficiary to take the many steps involved in finding such disclosures. While the proposal would allow participants and beneficiaries to opt out of electronic disclosures and instead receive paper by mail, the proposal lacks adequate protections for consumers, no matter which method of delivery is selected.

NNU is also concerned about several other inadequacies of the Proposed Rule’s “notice and access” framework detailed here.

- *Unclear Definition of Electronic Notice* - The Proposed Rule does not specify how a plan must electronically notify consumers about disclosures. While the Proposed Rule contemplates that the notice would be provided by email, there is no requirement to use email. Lacking such specificity, plans could notify consumers of the availability of a disclosure with a text message, a phone call or robocall, or some other electronic means like a mobile application. In many cases, this notice would not be verifiable or preservable. At a minimum, the Department should not consider phone calls or text messages as adequate notice in its rule.
- *Unreliable and Unused Email Addresses* - The Proposed Rule would allow plan administrators to assign or even make up email addresses for participants and beneficiaries. While it is common for employers to assign an email address to employees who work with computers, not all employees use email in their jobs. Once a worker leaves that job, the administrator need only take measures “reasonably calculated to

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<sup>2</sup> Examples of ERISA-required disclosures include the Summary Plan Description (the plan terms and conditions), Summary of Material Modifications (change made to the plan’s rules), annual reports on the solvency of the plan, pension benefits statements, as well as notices about payment options at retirement and spousal consent forms, disclosures about the fees being charged by investment funds in a 401(k), and many more.

<sup>3</sup> Plans are permitted to send documents out electronically by default (with a paper opt-out) to workers who use a computer as an integral part of their job duties, but otherwise, consumers must affirmatively opt in to electronic delivery. Moreover, the electronic disclosure itself must meet many conditions. *See* 2002 Electronic Disclosure Safe Harbor, 29 C.F.R. 2520.104(b)–1(c).

ensure the continued accuracy” of the email address. Retirees and former employees with vested benefit or a 401(k) account are easy to lose track of because they may not be claiming a retirement benefit until decades after they have left that job.

Although the Proposed Rule acknowledges that “unique issues” arise for vested participants once they leave the job, it utterly fails to resolve these issues. For instance, if an email notice bounces back, the plan administrator may, but is not required, to send a paper notice to the participant or beneficiary.<sup>4</sup> Bounce-backs should require a paper notice and opt-in election. Also, former employees and beneficiaries should not be considered “covered individuals” under the new framework; instead, once individuals sever employment, they should automatically be sent paper disclosures unless they affirmatively opt in to electronic delivery.

- *Actual Receipt of Disclosures Is Not Required* – The Proposed Rule provides no requirement that plan administrators confirm that notice emails are actually opened by the recipient, a fact that could be easily determined by company software. A recipient may never *actually receive* the notice or the disclosure if the email goes to a spam folder, gets buried or misfiled, or is simply deleted (perhaps by mistake) without being opened. Similarly, there is no requirement in the Proposed Rule that the recipient actually access the document. Plan administrators should be required to ensure both (1) that email notices are opened, and (2) that participants actually follow the website link provided and open or download the required disclosures. Unless *both* opening of an electronic notice and accessing of the required disclosure occur within a reasonable amount of time – occurrences that can be easily determined by the plan administrator – the administrator should be required to send a paper notice or disclosure by mail.
- *Inadequacy of Notice Access Requirements* – The Proposed Rule’s requirements on email notices are insufficient such that they do not ensure that notices are easily readable and understandable. For instance, the Proposed Rule allows notices to contain graphics and “design” elements, and it allows plan administrators to send out “consolidated” notices containing 7 different, and often lengthy, important disclosures such as the Summary Plan Description and Pension Benefit Statements. The Proposed Rule should have clearer requirements that the content of notices convey the significance of the initial opportunity to opt out of electronic disclosures and the many advantages of paper.
- *Inadequacy of Website Access Requirements* – The Proposed Rule’s website access standards are wholly inadequate. There is no requirement in the Proposed Rule that a weblink provided to the recipient take the individual directly to the disclosure (after a security login). Without such a requirement, participants and beneficiaries may have to wade through an undetermined amount of marketing communications or several pages in order to find the disclosure. All of this adds up to multiple barriers to actual receipt of disclosures by participants and beneficiaries. Disclosures should be the first thing the participant or beneficiary sees after upon following weblinks and logging in. Also, while the Proposed Rule requires notices to be in an accessible format, retirees who have home internet still may not have up-to-date software to be able to adequately access the website

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<sup>4</sup> See Proposed Rule’s Preamble (Proposed Rule at 56,905-06), and the proposed 29 C.F.R. 2520.104(b)-31(f)(4) (Proposed Rule at 56,922).

or document, or have the equipment to be able to preserve or print out the electronic document.

- *Inadequate Protection of Beneficiary Rights* – The Proposed Rule makes no exception for important action documents that plan administrators are currently required to provide to beneficiaries in writing, such as notices to spouses of their right to a survivor annuity and that their consent is required to waive that right. Written spousal consent is also required to give up the right to receive the balance of a worker-spouse’s 401(k) account in the event the worker dies while the funds are in the plan and to designate a different beneficiary. But the Proposed Rule does not create any separate notice and security requirements for spouses, divorced spouses (alternate payees), or other beneficiaries, and it does not even mention how the new E-Disclosure regime would address the current requirement that the spouse’s signature on consent forms be notarized.

## **II. Because Access to and Use of Broadband Internet Remains Unequal, the Proposed Rule’s Default Electronic Disclosures Will be Inequitable.**

Making electronic delivery the default means of delivering retirement disclosures would be inequitable. Access to and use of the internet has greatly expanded over the last 20 years; according to Pew Research Center, the percentage of adults ages 18 and older who use the internet has grown from about half in 2000 to 90% in 2019.<sup>5</sup> This growth has not been uniform, however; access to the internet and to broadband is substantially lower for several demographic groups:

- *Age* - 12% of adults aged 50-64 and 27% of adults aged 65 and older do not use the internet.<sup>6</sup> Consequently, there is a huge number of retired participants and beneficiaries who still need retirement plan disclosures but cannot access the internet.
- *Education* - 16% of those with a high school diploma, and 29% of those with only some high school, do not use the internet.<sup>7</sup>
- *Income* - 18% of those who earn \$30,000 or less do not use the internet.<sup>8</sup> Among those low-earners, more than 4 in 10 (46%) do not have a traditional computer or laptop or (don’t have broadband service at home 44%). About 3 in 10 (29%) do not own a smart phone.<sup>9</sup>
- *Geography* - 15% of those who live in rural areas do not use the internet.<sup>10</sup>

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<sup>5</sup> Pew Research Ctr., *Internet/Broadband Fact Sheet* (June 12, 2019) (*Fact Sheet*), available at <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> M. Anderson & M. Kumar, *Digital divide persists even as lower-income Americans make gains in tech adoption* (Pew, May 7, 2019), available at <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>.

<sup>10</sup> *Fact Sheet*, *supra* n. 5.

Additionally, more than one-fourth of adults do not have broadband service at home.<sup>11</sup> For some, this is because their community is not yet wired for broadband.<sup>12</sup> For others, steep monthly cost (50%) make broadband internet access unaffordable, while others do not have home broadband because they have access elsewhere, e.g., at their jobs (43%), or they access the internet using only a mobile phone (45%).<sup>13</sup> Some populations are dependent on smart phones for their access to the internet.

- *Income* – About one-fourth of low earners (\$30,000 or less) were dependent on a smartphone for internet access in 2019.<sup>14</sup>
- *Race/Ethnicity* – About one-fourth of black (23%) and Hispanic (25%) adults are dependent on a smartphone for internet access, compared to 12% of whites.<sup>15</sup>
- *Education* – 24% of high school graduates and nearly one-third (32%) of those with some high school are dependent on smartphones.<sup>16</sup>

These statistics are significant, because while one may be able to “access” the internet with a smartphone, these devices are wholly inadequate to the task of reading complicated financial disclosures and notices, or being able to print out or store them for future reference. Put simply, internet access that is dependent on a smartphone is not meaningful access and should be counted as “no internet access at all” for purposes of retirement plan disclosures.

Additionally, women are more likely to be negatively impacted by the failure of the Department to include in the Proposed Rule protections of spousal notice and disclosure rights. The law provides important spousal rights to a worker’s pension or 401(k) balance, but the exercise of these rights depends upon important disclosures, notices, and, for spousal beneficiaries, spousal consents. Currently, notices and spousal consents must be in writing and notarized. The Proposed Rules, however, makes no provisions to protect spousal rights, such as by ensuring that spouses receive separate disclosures and election options, or written consents that can be authenticated, so that they can be relied upon when needed. Because women more often shoulder caregiving responsibilities with fewer years in the workforce, and because they still earn less than men, women are more reliant than men on receiving retirement benefits as *beneficiaries* – as surviving spouses and as divorced spouses.

In the Proposed Rule, the Department concedes gaps in access to the internet may create impediments to accessing critical plan information. For instance, the Department recognizes that the Proposed Rule would have an adverse impact on participants who do not have ready internet

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<sup>11</sup> *Id.*

<sup>12</sup> See, A. Perrin, *Digital gap between rural and nonrural America persists* (Pew, May 31, 2019), available at <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/>.

<sup>13</sup> M. Anderson, *Mobile Technology and Home Broadband 2019* (Pew, June 13, 2019), available at <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>.

<sup>14</sup> Pew Research Ctr., *Mobile Fact Sheet* (June 12, 2019), available at <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*



access because it would require participants to use unsecure terminals at a public library, but the Department claims it cannot quantify that impact and provides no solutions.<sup>17</sup> The Proposed Rule's provision enabling individuals to globally opt out of electronic delivery and to affirmatively select paper/mail for all disclosures *helps* answer this problem, but an opt out does not answer such issues sufficiently because (1) notice requirements remain inadequate, (2) participant inertia and misunderstanding of the significance of electing the opt out, (3) the lack of understanding/engagement with retirement benefits, and (4) participants often need the disclosures decades after terminating employment, or for a surviving spouse, many years after retirement.

### **III. Protections to Ensure Document Preservation Are Ignored.**

An absolutely critical role that retirement plan disclosures play is that they provide written proof of the rules that applied at the time a worker was participating in the plan, and evidence of the benefits earned. The Proposed Rule, however, fails to ensure that these important disclosures are preserved. Participants and beneficiaries often need access to documents decades after they have vested and terminated employment, or decades after retirement, to make claims to benefits and ensure benefits are correct. Requiring plan administrators to retain all prior documents (versions and applicability dates) and make them easily accessible to participants and beneficiaries some 40 years later is easy for an administrator to do – just preserve the documents and disclosures on a server and archive them to be searchable. Yet, the Proposed Rule not only fails to require such preservation, it permits administrators to delete the prior documents on the website as soon as they are superseded. There are other problems too. A consumer may download a document to a hard drive, but hard drives often fail and are not always recoverable. Those dependent on a mobile phone are unlikely to be able to print out or preserve a document on the phone. Heirs may need to locate documents after a participant or beneficiary dies but without paper, they must have the decedent's login information, and even then, the applicable documents may be gone due to the lack of a preservation requirement.

### **IV. Opt-Out Provisions Are Also Inadequate.**

Proposed Rule contemplates that all of the deficiencies in its proposal are cured, or at least neutralized, by its provisions enabling participants and beneficiaries to receive a single initial paper disclosure informing them of their ability to “globally” opt out of all electronic disclosures or to request paper copies of specific disclosures free of charge.

First, there is also a requirement that the consumer be informed how to exercise their right to paper copies, but there are no requirements for what this process should look like. For instance, participants and beneficiaries who prefer paper should not be required to write a letter, or uncheck a pre-checked box, or locate well-hidden “preferences” in order to get a paper copy of disclosures. Any notice to elect paper should, at minimum, be a prominent check box on the initial disclosure, and a prominent button or link in each electronic notice as well as on the website page with the disclosure.

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<sup>17</sup> Proposed Rule at 56,915-16.

Moreover, in the initial notice in particular, beneficiaries and participants should be apprised of all the advantages and disadvantages – such as those discussed in these comments – of giving up their rights to paper disclosure. Beneficiaries and participants need to understand the significance of the choice they have to opt out. At minimum, an opt out notice should apprise the participant or beneficiary that if they do not opt out of electronic notices and elect to receive paper notices, that they will no longer receive notices or disclosures on paper. An opt out notice should also state that all the burden to be aware of, understand, and act on electronic notices would be borne by the participant or beneficiary and not the plan administrator, and that it was the responsibility of the plan participant or beneficiary to find the disclosure or notice on the provider’s website, to save it electronically, and to print it out for safekeeping, for themselves and their heirs. Additionally, retirees, former employees, beneficiaries, those who rely on mobile phones for internet access or do not have a computer with internet access at home should also be alerted to their right to globally opt out of electronic delivery of notices and disclosures and their right to receive such notices and disclosures in paper. Participants and beneficiaries should also receive an *annual* reminder notice of their right to globally opt out of electronic delivery and how to do it.

Finally, plan administrators should not be allowed to punish those who elect paper by denying them electronic access to the documents or the website. The Proposed Rule fails to impose any requirement on plan administrators to maintain electronic access for those who prefer paper. Those who elect paper should still be able to access notice and disclosure documents electronically, just as those who accept electronic delivery can *also* request a paper copy of that electronic document. The regulations should require that paper choosers still get online access to documents as well as to online tools and information.

#### **V. The Proposed Rule Provides a Financial Giveaway to the Financial Services Industry, Shifts Costs on Consumers.**

Plan administrators should be required to document any savings generated by an E-Disclosure default rule and to pass on any such savings generated to plan participants and beneficiaries or to the plan. If the rule does not require that savings be passed on to plan participants and beneficiaries, all of the financial costs of purchasing equipment (e.g., a computer), maintaining internet access, and printing out disclosure documents (including ink and paper) would be shifted to participants and beneficiaries.

According to the regulatory analysis, this new E-Disclosure framework would save plan administrators \$2.4 billion over 10 years. As one plan administrator put it, “Imagine if the agency had adopted this proposal, say, 10 years ago. We would all be \$2.4 billion richer.”<sup>18</sup> Tax-qualified plans, however, are lawfully required to be operated and managed solely for the benefit of participants and beneficiaries. Plan sponsors and administrators have a fiduciary duty to make decisions for the benefit of the participants and beneficiaries. Yet, the Proposed Rule imposes absolutely no requirement for plans to pass on those savings generated by the rule to the plan participants or beneficiaries., e.g., by adding to the pension fund corpus, or by reducing 401(k)

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<sup>18</sup> M. Barry, “Barry’s Pickings: Software Eats ERISA Disclosure,” *PLANSPONSOR* (Nov. 1, 2019), <https://www.plansponsor.com/barrys-pickings-software-eats-erisa-disclosure/>.

fees. Without requiring that savings generated by E-Disclosure be passed onto plan beneficiaries and participants, the Proposed Rule would allow plan administrators to pocket the windfall.

## **VI. The Proposal Ignores Consumer Preferences and Research on the Comparative Effectiveness of Communications Methods.**

Study after study, including those conducted by the financial services industry, find that the majority of consumers prefer their financial documents to be delivered on paper in the mail rather than electronically. Participants and beneficiaries – the people for whom these disclosure requirements exist – have not demanded an electronic “notice and access” framework. Some key findings are noted here.

- When investors were asked how they would prefer to receive disclosures, paper documents in the mail was the most frequently chosen method (49%) among respondents surveyed. Only 6% wanted disclosures by accessing the internet – the method the Proposed Rule would impose as the default method of delivery.<sup>19</sup>
- Retirement plan participants *of all ages* overwhelmingly (74%) think the retirement disclosure rules should make paper documents sent by mail the default, with an option to request electronic delivery, rather than in electronic form with an option to request paper. Only 21% said they preferred receiving an email with a link to a website as the rule.<sup>20</sup>
- Retirement plan participants are more likely both to read and to save retirement documents that are on paper rather than in electronic form.<sup>21</sup>

The Department, in the Proposed Rule, fails to analyze the extensive research on what types of communications are more often noticed, read, understood, and preserved. Moreover, Plan participants and beneficiaries are more likely to give printed disclosures a “systematic, deeper reading” than those delivered in online formats, and this deeper reading affected comprehension, and “in turn affected personal asset allocation decisions.”<sup>22</sup>

## **VII. Conclusion**

The Proposed Rule is being promulgated at the decades-long lobbying effort of the financial services industry, without any serious attempt to grapple with the new framework’s adverse impact on certain groups, particularly groups that have less access to the internet.

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<sup>19</sup> FINRA Investor Ed. Fdn., *Investors in the U.S. 2016*, at 13, available at [https://www.usfinancialcapability.org/downloads/NFCS\\_2015\\_Inv\\_Survey\\_Full\\_Report.pdf](https://www.usfinancialcapability.org/downloads/NFCS_2015_Inv_Survey_Full_Report.pdf).

<sup>20</sup> R. Perron, *Paper by Choice: People of All Ages Prefer to Receive Retirement Plan Information on Paper*, at 11 (AARP, Nov. 2012), available at <https://www.aarp.org/work/retirement-planning/info-11-2012/retirement-plan-information.html>.

<sup>21</sup> *Id.*

<sup>22</sup> J.W. Hutchinson, R. Botto, *et al.*, *Financial Communications and Asset Allocation Decisions: The Effects of Reading Style, Financial Knowledge, and Individual Differences*, at 1 (TIAA Institute, June 2017), available at [https://www.tiaainstitute.org/sites/default/files/presentations/2017-06/Hutchinson%20Zauberman%20Botto\\_Financial%20Communications\\_RD\\_June2017.pdf](https://www.tiaainstitute.org/sites/default/files/presentations/2017-06/Hutchinson%20Zauberman%20Botto_Financial%20Communications_RD_June2017.pdf).



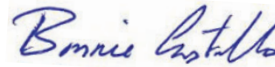
Without any evidentiary support or reasonable explanation of how participants and beneficiaries will be at least as well-protected as the current, well-balanced framework. The Proposed Rule imposes all of the disadvantages of technology but confer none of its advantages, and it shifts all of the risks, burdens, and costs of ensuring adequate disclosure away from plan administrators and on to participants and beneficiaries. Moreover, rather than acknowledging and addressing the many problems raised by the Proposed Rule, the Department instead punts many of the most troubling questions to commenters and expects the public to address them in an unreasonably short comment period.

The current opt-in system for disclosures and notices to plan beneficiaries and participants is working well to ensure actual receipt of such disclosures and notices. This current system of opting into electronic disclosure, rather than opting out of default electronic disclosure, should be retained for all important, personalized, and action-required documents. If plans want to deliver some less important, non-personalized documents electronically, that is reasonable, but the kinds of non-personalized documents that could be sent electronically should be substantially narrowed and adequate protections for plan participants and beneficiaries must be in place.

Because the Proposed Rule fails to protect plan participant and plan beneficiary rights to actually receive such important disclosures about their retirement plans, NNU opposes the Proposed Rule and urges the Department to withdraw the Proposed Rule.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Bonnie Castillo".

Bonnie Castillo, RN  
Executive Director  
National Nurses United