



October 8, 2019

Mr. Paul Ray
Acting Administrator
Office of Information and Regulatory Affairs
Executive Office of the President
1650 Pennsylvania Ave., NW
Washington, DC 20503

Subject: Why DOL's Proposed Rule, "Improving Effectiveness of and Reducing the Cost of Furnishing Required Notices and Disclosures" (RIN 1210-AB90) is Unnecessary, Unjustified, and Should be Withdrawn

Dear Acting Administrator Ray:

The Coalition for Paper Options wishes to submit the following additional information as a follow-up to our meeting on September 19.

OMB is currently considering a proposed rule by the Department of Labor (RIN 1210-AB90) that would allow retirement plan fiduciaries to switch the current default delivery method for important retirement plan disclosures from paper to electronic. The Coalition for Paper Options and our supporting organizations oppose this rule and urge OMB to withdraw the proposal. The reasons for our opposition are summarized below:

Under longstanding principles for regulatory planning and review, claimed administrative cost savings and unsubstantiated assertions do not justify government regulation.

- **There has not been a "market failure" that justifies this regulation.** Under the first principle of Executive Order 12866 – which has governed US regulatory planning and review for over 25 years – an agency may not issue a regulation to disrupt the status quo unless the agency clearly demonstrates that there is a "compelling public need," such as "material failures of private markets." E.O. 12866, Sec. 1(a).¹

Under the status quo, consumers who prefer their retirement plan disclosures in paper have their preference honored, and consumers who prefer electronic disclosure can opt in to electronic delivery. Citizens who prefer electronic information are taking this option, while others continue their preference for paper-based disclosures. In any event, the current system is working.

¹ E.O. 12866 also recognizes that regulation may be justified where "required by law" or "necessary to interpret the law," but neither condition applies to these regulations, which are discretionary. See Sec. 1(a).

There are many rational reasons why workers and retirees prefer paper disclosures of this important and sensitive information.

- Investors continue to consistently prefer paper-based financial information.²
- Studies indicate reading comprehension improves with paper-based information.³
- Broadband access remains sparse in many areas of the country,⁴
- Cyber-security concerns have cemented a preference to paper-based information for many people.

Yet, at the urging of retirement plan fiduciaries who are responsible for keeping workers and retirees informed, the Department of Labor's Employee Benefits Security Administration (EBSA) apparently is assuming that worker preferences are null or meaningless, and that EBSA must take the paternalistic action to reverse the current default and compel consumers into an electronic-only default system unless they go through new hurdles to retain their current paper disclosures. There is no compelling evidence that DOL knows better than the millions of workers who prefer to receive their particularly sensitive and important retirement information in paper form and have chosen not to opt out of paper information.

- **Regulating would fail to maximize net benefits to society:** It is apparent that EBSA fails the basic test required to justify regulating. Based on the limited information publicly available, EBSA's justification for a new regulation reversing the status quo is intended to: (1) save plan fiduciaries money because electronic disclosure is cheaper than paper disclosure; and (2) would make these important disclosures "more understandable and useful."⁵

While saving administrative costs for fiduciaries is a relevant factor to consider, it is *insufficient to justify a regulation*. The longstanding principle since President Reagan's Executive Order 12291 and continuing today is that, unless statutory language requires otherwise, agencies may only regulate if it will do more good than harm, and maximize net benefits to the public. E.O. 12866, Sec. 1(a). It is evident that EBSA cannot meet this basic test to regulate for many reasons, including:

² FINRA Investor Education Foundation, *Investors in the United States 2016*, Financial Industry Regulatory Authority, Inc. (Dec. 2016); Annual Report and Semi-Annual Report Notification Study: Understanding the impact of providing investors with mutual fund and ETF report notifications, True North Market Insights (June 2015); Investor Testing of Mutual Fund Shareholder Reports, Siegel & Gale Report to the SEC (2011; Revised: 2012); How Might the Proposed Rule on Accessing Annual and Semiannual Mutual Fund Reports Affect Investor Behavior, Forrester Consulting on Behalf of Broadridge Financial Solutions, Inc. (2015); AARP Research Paper by Choice: People of All Ages Prefer to Receive Retirement Plan Information on Paper, Social Science Research Solutions on behalf of AARP (Nov. 2012).

³ "The Reading Brain in the Digital Age: The Science of Paper versus Screens," *Scientific American*, (April 11, 2013).

⁴ Pew Research Center: "Digital gap between rural and nonrural America persists," (May 31, 2019).

⁵ See Unified Regulatory Agenda, DOL/EBSA, "Improving Effectiveness of and Reducing the Cost of Furnishing Required Notices and Disclosures," RIN 1210-AB90 (Spring 2019).

- EBSA fails to take into account the benefits of paper-based information, including security, readability, and universal access.
 - EBSA fails to demonstrate that it has knowledge superior to the collective judgment of millions of workers and retirees that it is better for them to receive their important and sensitive retirement plan disclosures in electronic form rather than paper form.
 - EBSA fails to demonstrate that, notwithstanding their choice not to opt-in to electronic information, workers and retirees actually prefer to have the default switched from paper to electronic information. In other words, ***EBSA fails to provide sufficient and compelling evidence to justify reversing the current default rule for paper-based information.***
 - Bald assertions that electronic delivery of information will “make these disclosures more understandable and useful for participants and beneficiaries” do not justify reversing the status quo. Citizens comfortable with technology may find electronic disclosures more useful, but the majority who currently receive this information in printed form evidently do not agree.
- **EBSA’s regulation would undermine a fundamental statutory duty.** The fundamental statutory duty of retirement plan fiduciaries is to keep workers and retirees informed about their retirement plans. Unfortunately, millions of Americans without interest in or ready access to robust internet services may never see these notices again. It is up to them, after all, to switch back to paper delivery once the proposed rule is in place. And if they miss the notice, fail to check an online account, or don’t see a notice in their spam filter, they may never see retirement plan disclosures again. This fundamental statutory obligation should not be undermined to save fiduciaries relatively minor administrative costs.

Under longstanding principles for regulatory planning and review, the burden of proof to justify new regulation is on EBSA, not on members of the public who will be adversely affected by its action.

Because EBSA has not met its burden of proof to regulate, OIRA should reject the draft proposed rule.

Respectfully,

Coalition for Paper Options
 Consumer Action
 Domtar Corp.
 Hallmark
 International Paper
 National Association of Letter Carriers
 National Grange
 National Rural Letter Carriers
 Association
 Printing Industries of America
 The American Forest & Paper Assoc.
 Twin Rivers Paper