



601 Pennsylvania Avenue, N.W. South Building – Suite 900 - Washington, D.C. 20004-2601
Phone: 202-220-3172 Fax: 202-639-8238 Toll-Free: 1-866-360-7197
Email: nrlnmessage@msn.com Website: <http://www.nrln.org>

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The Employee Benefits Security Administration issued a Request for Information on April 7, 2011 regarding electronic disclosure by employee benefit plans. This request solicited views and comments as to whether the DOL's current electronic disclosure safe harbor should be expanded or modified. The National Retiree Legislative Network, (NRLN), has determined that the subject matter of this RFI is of substantial importance to its members. The NRLN is a non-profit and non-partisan grassroots coalition of 30 retiree associations, as well as individual members, representing more than 2 million retirees who have retired from more than 125 different U.S. corporations and public entities. The NRLN's principal mission is to protect the interests of retirees and workers covered by the qualified pension and welfare benefit plans of U.S. corporations. Therefore, the concerns we express in this document are from the perspective of our retirees. It is important to note as well that there are other demographic groups that should share the same or similar concerns.

With a few exceptions as listed below, the NRLN's overall conclusion is that the current safe harbor regulations should not be changed based on the available Internet access and usage data for those of retirement age. The NRLN does recommend, however, that all beneficiaries be annually notified by mail that they are required to specifically select the electronic notification option, or "opt-in," and that time-sensitive notifications also be sent by standard U.S. mail for those who have opted to receive electronic communications. If there is no response, the beneficiary shall be deemed to have opted out. To insure that there is easy access to documents for those who do opt-in, a direct link should be provided to referenced provisions of a plan website. Furthermore, an accessible online archive of all previous plan documents must be maintained. Finally, plan providers/administrators should be required to disclose the privacy standards and enforcement procedures that are in effect for personal data that is accessible online.

Summary

- **Retirees would not be well served by the proposed changes:** The use of electronic communication with regard to retiree benefits would have a disproportionately adverse impact on retirees. Beneficiaries who are unable to receive communications regarding changes in their plans or time-sensitive mandatory selections are at risk of having their benefits substantially diminished or entirely lost without their knowledge.
- **Internet communication has not been adopted by a substantial portion of the elderly population.** Indeed a closer reading of the U.S. Census Bureau, Current Population Survey, October 2009, referred to in the RFI as showing 76.7% of the households have some access to the internet, will also show that only 63% of households over 55 have *any* access. As to Internet use at home, 41.8% of households over the age of 55 have no internet use at home, compared to 31.3% of the household as a whole.¹ A more refined stratification of the age

¹ The census information may be found at <http://www.census.gov/population/www/socdemo/computer.html>

groups will bring the disproportionate impact into a much sharper focus. The Pew Internet & American Life Project recently did a study of computer use based on age. Their study found that 76% of individuals between age 56 and 64 went online for any purpose, including email. Only 58% of the people between the ages of 65 and 73 went online. And a mere 30% of individuals over the age of 74 go online for any purpose.² Moreover, the Pew study found that only 20% of Americans age 74 or older have access to home broadband (see chart, attached as Exhibit A).³ This data makes it quite clear that the population over 55 years of age is much less likely to utilize internet communications on a regular basis, if at all. We believe this is due to the fact that they have less experience with this medium than younger members of the population. Retirees are even less likely to have access to electronic communication than older workers who may have access to computers and the Internet on the job, even if not at home. Furthermore, elderly individuals are less likely to have training in the use of this medium and, since retirees often have lower incomes than the general population, they are less able to afford home computer systems and monthly Internet service contracts.

- **Surviving spouses pose a special concern.** The concerns noted above are amplified when applied to the surviving spouse of a retiree. The current safe harbor requires that the retiree opt in before the exclusive use of electronic communication. However, if the retiree predeceases the spouse, some mechanism should be in place to ensure that the surviving spouse is protected by the same safe harbor as the retiree. At a minimum, this suggests that an affirmative opt-in should be required on an annual basis for plan participants whose surviving spouse would continue to be a beneficiary.
- **The cost of internet communications makes online usage unaffordable for some retirees. In developing its National Broadband Plan, the FCC conducted a national survey of 5,005 adult Americans that over-sampled non-adopters. The Commission found that cost was the primary reason cited by the 35% of adults with no access to broadband at home. “When prompted for the main reason they do not have broadband, 36% of non-adopters cite cost,” the Plan stated.**⁴ As noted above, retirees generally have lower incomes than the population as a whole. In addition to the upfront cost of hardware – and the ongoing monthly cost of buying service from an Internet Service Provider, computers often malfunction or simply have to be upgraded periodically. Some retirees may not be able to afford a system repair or upgrade after they have opted in. We believe that retirees should be required to opt in on an annual basis. Furthermore, any time-sensitive notifications should still be sent by mail.
- **Plan websites are often confusing or poorly organized.** Plan providers/administrators will sometimes notify retirees of changes in a program by a general announcement followed by a reference to a part of the program maintained on a website. Often, the retiree is unable to find the relevant provision of the plan in the website. We recommend that providers/administrators who want retirees to read the relevant plan provision provide a direct link to that provision and/or toll free help number that is staffed by individuals who can guide the caller to the relevant section of the plan.

² This survey also shows that the availability of broadband to older adults is even more limited. See attachment A. Pew Internet & American Life Project, *Generations 2010*, at pp. 5, 10; available at <http://www.pewinternet.org/Reports/2010/Generations-2010.aspx>.

³ Pew Internet & American Life Project, *Generations 2010*, Report at p. 7, available at http://pewinternet.org/~media/Files/Reports/2010/PIP_Generations_and_Tech10.pdf

⁴ Federal Communications Commission, *Connecting America: The National Broadband Plan* (March, 2010), at p. 168.

- **There needs to be greater accessibility of archival information.** Finally, the terms of a previously modified plan may become significant to a retiree's ability to enforce his rights under that plan or make plan changes, (e.g. prior coverage notices may be needed if a retiree chooses to apply for a Medigap supplemental insurance policy). As a result there must be an independent repository for all previous iterations of existing and future plan documents that are subject to reasonable access by beneficiaries of those plans.
- **Privacy.** The storage of personal information, particularly medical and financial information, is of great concern to all individuals. Reports of computer hackers or the inadvertent action of administrators exposing personal information are becoming common. Therefore, we believe that any rule making regarding electronic communication should include disclosure of what personal information is retained by the plan providers/administrators and what privacy standards and enforcement procedures will be in place to protect plan participants.

The following addresses the specific questions asked by the DOL.

Access and Usage Questions

Question 1. What percentage of people in this country has access to the internet at work or home? Of this percentage what percentage has access at work versus at home? Does access vary by demographic groups (e.g. age, socioeconomic, race, national origin, etc.)?

Answer 1. According to the U.S Census Bureau's Current Population Survey referenced above and in the RFI, 76.7% of the total U.S. households have access to the internet at some location. However, as also noted in that survey, access to online communication does vary greatly by demographic groups. This problem is highlighted in the National Broadband Report released last year by the Federal Communications Commission after a year-long inquiry that included large-scale surveys, town hall meetings and 30 Notices of Inquiry generating thousands of pleadings by experts and average citizens alike. The FCC's chapter on "Adoption and Utilization" begins by stating its finding that:

While 65% of Americans use broadband at home, the other 35% (roughly 80 million adults) do not. Some segments of the population—particularly low-income households, racial and ethnic minorities, seniors, rural residents and people with disabilities—are being left behind.⁵

The FCC found that the broadband adoption rate among Americans age 65 and older was 35% -- the lowest among any demographic group other than low-income individuals with less than a high school diploma. And while some Americans over age 65 lacking access to a broadband internet connection may be using a dial-up connection (the Pew study found 5% of American households rely on dial-up), the NRLN believes that EBSA should assume that navigating a corporate website and downloading important documents will require a connection meeting the minimum broadband availability standard established by the FCC in the National Broadband Plan. The lack of adoption and utilization by older Americans, as noted above, is particularly stark. The data make it absolutely clear that there is a substantial decline in internet adoption and use among each population cohort as it increases in age.

Question 2. What percentage of participants and beneficiaries covered by an ERISA plan has access to the Internet at work or home? Of this percentage, what percentage has access at work, at home, or both? Does access by demographic groups (e.g., age, socioeconomic, race national origin, etc.)? What

⁵ FCC, *Connecting America: The National Broadband Plan*, at p. 167.,

percentage of participants and beneficiaries uses the Internet to access private information such as personal bank accounts?

Answer 2. NRLN does not have statistical information grouped by ERISA plan coverage. However, with regard to the percentage of individuals who access bank accounts on line, the Pew Internet & American Life Project has determined that 58% of all adults 18 years of age and older use the internet to do online banking. We believe the adoption of online banking is a reasonable proxy for the likelihood that a demographic group can be expected to rely entirely on electronic communication to monitor and manage their pension or other employee benefit plans.

For those age brackets that encompass retirees the percentages reported by Pew are as follows:

56 - 64	—————	56%
65 - 73	—————	44%
74+	—————	35% ⁶

Question 4. What percentage of employee welfare benefit plans covered by ERISA currently furnish some or all disclosures required by ERISA electronically to some or all participants and beneficiaries covered under these plans? Please be specific regarding types of welfare plans (e.g. active employees, retirees, COBRA Qualified Beneficiaries etc.) and types of disclosures (e.g., all required title I disclosures versus select disclosure).

Answer 4. Many of the companies whose retirees are members of NRLN offer some information to plan participants electronically. As an example, AT&T offers an opt-in option for their Health Care Plan notifications. However, some of the electronic recipients are not satisfied with the delivery format. AT&T will sometimes just reference a website without specific directions as to a location within that website. As a result, many employees feel they are looking for the proverbial needle in a haystack. This concern was discussed in the summary above.

Question 6. What are the most significant impediments to increasing the use of electronic media (e.g. regulatory impediments, lack of interest by participants, lack of interest by plan sponsors, access issues, technological illiteracy, privacy concerns, etc.)? What steps can be taken by employers, and others, to overcome these impediments?

Answer 6. We believe that the most significant impediments are access issues, technological illiteracy and cost concerns for retirees. The NRLN's experience in this regard is consistent with the findings of the FCC's survey of 5,005 adults concerning adoption barriers, as noted above, which concluded that costs, technical literacy and lack of relevance are the leading self-reported obstacles to home broadband adoption, particularly among those demographic groups with the lowest rates of utilization.⁷

General Questions

Question 9. Should the Department's current electronic disclosure safe harbor be revised? If so, why? If not, why not?

⁶ <http://www.pewinternet.org/Reports/2010/Generations-2010.aspx>, page 11.

⁷ See FCC, *The National Broadband Plan*, at p. 168-169.

Answer 9. Yes, it should be revised. As noted above, computer systems malfunction or have to be upgraded. Many retirees cannot afford to do that. Therefore, at any given time a certain percentage of beneficiaries will have inoperative computers. Additionally, surviving spouses should be given the rights required by the safe harbor regulations.

Question 10. If the safe harbor should be revised, how should it be revised? Please be specific.

Answer 10. The safe harbor regulations should contain a mandatory annual opt-in requirement, sent by U.S. mail. Recipients could be asked to respond either through U.S. mail or electronically. If they fail to opt in through the internet, the primary form of communication with that plan participant would automatically revert to regular mail. This would allow surviving spouses who might not want to participate in an electronic notification program and those with inoperative computers to be placed on notice that they can receive communications through ordinary mail. Finally, all time-sensitive notifications sent electronically should also be sent by standard mail, since at any given time a certain percentage of retirees will have inoperative computers.

Question 13. Should a revised safe harbor have different rules or conditions for different recipients entitled to disclosures (active employees, retirees, COBRA Qualified Beneficiaries, etc.)?

Answer 13. The current differentiation in the safe harbor rules between employees with access to company computers as a part of the regular duties and all others seems reasonable.

Question 14. To what extent should the Department encourage or require pension and welfare benefit plans to furnish some or all disclosures required under title I of ERISA through a continuous access Web site(s)? In responding to this question, please address whether and how frequently participants and beneficiaries should be notified of their ability to access benefit information at the Web site(s) and the most appropriate means to provide such notice. For example, should participants and beneficiaries receive a monthly notification of their ability to access benefit information or should they receive a notification of their ability to access benefit information or should they receive a notification only when an ERISA-required disclosure is added to the Web site? How should such notifications be furnished (e.g., paper, e-mail, etc.)? Please also address what steps would be needed to ensure that participants and beneficiaries understand how to request and receive paper copies of disclosures on the Web site(s).

Answer 14. In general, we believe that a continuous access website with a permanent archive of plan documents and disclosures is a useful tool for all employees and retirees to have at their disposal. They should be notified of its existence at least once a year for general purposes. However, if a required disclosure is being made, then, for those who opted in, it should either be a stand-alone complete disclosure by e-mail or a notification by e-mail that a disclosure has been issued and a link to the web site page containing that disclosure. If the recipient of the disclosure has not opted in then the disclosure must be mailed. If the opt in recipient is unable to print the disclosure then the recipient should be able to request a paper copy of the disclosure by a reply to the e-mail notification of the disclosure.

Question 15. Who, as between plan sponsors and participants, should decide whether disclosures are furnished electronically? For example, should participants have to opt in to or out of electronic disclosures? *See* Question 26.

Answer 15. Participants must opt in. Plan sponsors could not possibly know the circumstances of individual participants. Otherwise the disclosures should be mailed. Moreover, participants should be able to opt out at their discretion since they could lose access for any number of reasons.

Question 16. Should a revised safe harbor contain conditions to ensure that individuals with disabilities are able to access disclosures made through electronic media, such as via continuous access Web sites? If so, please describe the conditions that would be needed. Also, please identify whether such conditions would impose any undue burdens on employee benefit plans, including the costs associated with meeting any such conditions. What burden and difficulty would be placed on employees with disabilities if the Web sites and/or other electronic communication were not accessible?

Answer 16. If recipients must opt in, individuals with disabilities can choose to receive the disclosures through standard mail. This might add the burden of some additional cost on the benefit plan but we do not believe it would result in an unreasonable burden. At this juncture we are unaware of any undue burdens this would place on disabled participants.

Technical Questions

Question 17. If a plan furnishes disclosures through electronic media, under what circumstances should participants and beneficiaries have a right to opt out and receive only paper disclosures?

Answer 17. For reasons discussed above participants and beneficiaries should always have the right to opt out, since they could lose internet access due to a number of reasons. The only limitation should be that the plan provider/administrator should be given a reasonable period of notification.

Question 18. The Department's current regulation has provisions pertaining to hardware and software requirements for accessing and retaining electronically furnished information. In light of changes in technology, are these provisions adequate to ensure that participants and beneficiaries, especially former employees with rights to benefits under the plan, have compatible hardware and software for receiving the documents distributed to their non-work e-mail accounts?

Answer 18. As suggested above, the participants should be required to opt in annually. Any changes in the hardware and software requirements should be disclosed to the participants at least 60 days before they are required to opt in. Technical support could be offered by the provider/administrator so participants can call in or e-mail with questions regarding compatibility.

Question 19. Some have indicated that the affirmative consent requirement in this Department's current electronic disclosure safe harbor is an impediment to plans that otherwise would elect to use electronic media. How specifically is this requirement an impediment? Should this requirement be eliminated? Is the affirmative consent requirement a substantial burden on electronic commerce? If yes, how? Would eliminating the requirement increase a material risk of harm to participants and beneficiaries? If yes, how?

Answer 19. The affirmative consent requirement absolutely should not be eliminated since its elimination would increase a material risk of harm to participants and beneficiaries. As discussed above, without affirmatively opting in, the beneficiaries face numerous risks of not receiving information essential to maintaining their benefits.

Question 20. In general, the E-SIGN Act permits electronic disclosure of health plan materials but does not apply to cancellation or termination of health or benefits electronically. Are there special considerations the Department should take into account for group health plan disclosures (including termination of coverage and privacy issues)?

Answer 20. Because of the risks associated with electronic media such as equipment malfunction, human error, loss of data etc., anything as serious as termination or cancellation of benefits should not be done exclusively by electronic disclosure.

Question 21. Many group health plan disclosures are time-sensitive (e.g. COBRA election notice, HIPAA certificate of creditable coverage, special enrollment notice for dependents previously denied coverage under the ACA, denials in the case of urgent care claims and appeals). Are there special considerations the Department should take into account to ensure actual receipt of time-sensitive group health plan disclosures?

Answer 21. As noted above, time sensitive disclosures should always be made by mail along with any other elected mode of communication.

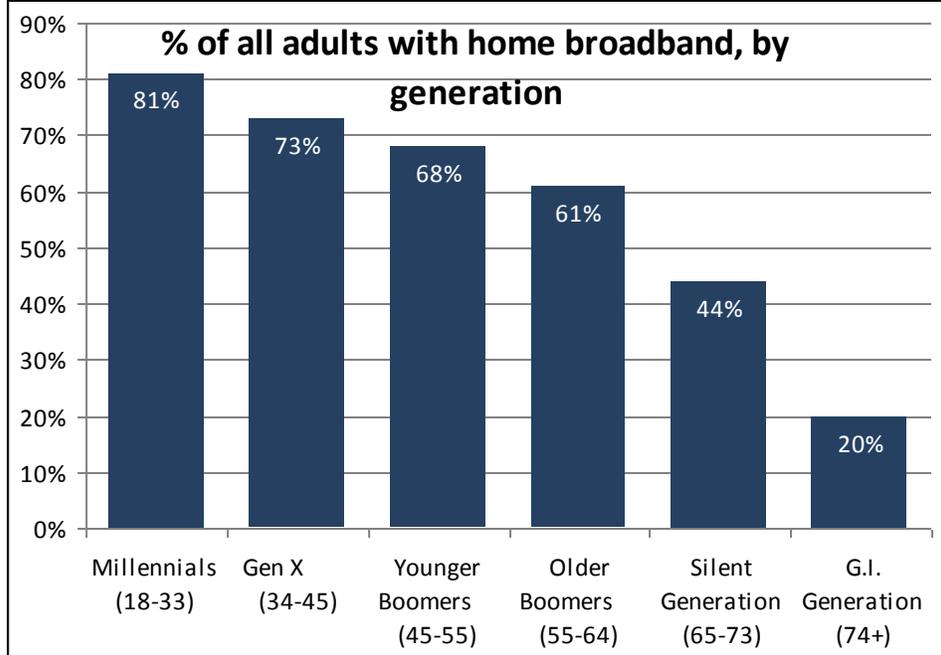
Conclusion

In sum, it is clear that electronic-only distribution of benefit plan documents and disclosures is not yet appropriate for retired persons over age 55. If a plan participant will benefit from electronic distribution, they should have the chance to affirmatively opt-in on an annual basis. All beneficiaries should be notified annually by mail that they must affirmatively select the electronic notification option, or “opt-in.” If there is no response, the beneficiary shall be deemed to have opted out. Time-sensitive or high stakes notifications (such as those concerning cancellation or changes in benefit amounts) should also be sent by standard U.S. mail even for those who have opted to receive electronic communications. To ensure that there is easy access to documents for those who do opt-in, a direct link should be provided to referenced provisions of a plan website. Furthermore, an accessible online archive of all previous plan documents must be maintained. Finally, plan providers/administrators should be required to disclose the privacy standards and enforcement procedures that are in effect for personal data that is accessible online.

Bill Kadereit

Bill Kadereit, President
National Retiree Legislative Network

EXHIBIT A



Source: "Generations 2010," May 2010 Survey, Pew Internet and American Life Project Dec. 16, 2010 (available at <http://www.pewinternet.org/Reports/2010/Generations-2010.aspx>)