ERIC The ERISA Industry Committee
Driven By and For Large Employers
1400 L Street, NW, Suite 350, Washington, DC 20005 • (202) 789-1400 • www.eric.org

Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors

Testimony before the Advisory Council on Employee Welfare and Pension Benefit Plans
U.S. Department of Labor
Washington, D.C.

June 7th, 2017

Introduction

Thank you for the opportunity to testify before you today. I am Will Hansen, Senior Vice President for Retirement & Compensation Policy at The ERISA Industry Committee, also known as ERIC. ERIC is the only national trade association that advocates exclusively for large employers on health, retirement and compensation public policies on the federal, state and local levels. Representing solely the large plan sponsor perspective, ERIC supports the ability of its large employer members to tailor retirement, health, and compensation benefits for millions of workers, retirees, and their families. One of ERIC's key policy goals is to remove unnecessary regulatory hurdles so that the resources that employers set aside to provide retirement benefits to their employees are used as efficiently and effectively as possible. The development and distribution of required retirement plan disclosures represents a significant regulatory hurdle for large employer plan sponsors. I appreciate the ERISA Advisory Council ("Council") recognizing this issue and providing a forum to discuss ways to ensure required plan disclosures are more effective.

My testimony today will address several key problems facing large employer plan sponsors when developing and distributing required plan disclosures, including the need to streamline, eliminate, or alter disclosures currently being delivered to plan participants. I will end my testimony by touching upon the need to address the distribution options of these disclosures by plan sponsors.

Before I begin, I would like to briefly provide my background as I believe it will provide context to my testimony. In summary, I practiced law for several years at a top law firm focusing on employee benefit matters. I routinely reviewed and updated participant plan disclosures to ensure the plan sponsor was in compliance with all applicable rules and regulations. I worked in the United States Senate, with my legislative portfolio including policies to promote and enhance retirement savings. Finally, prior to joining ERIC, I was a plan sponsor, overseeing all employee benefits for a Fortune 200 company. As a human resource professional, I was able to experience first-hand the difficulty of explaining to employees the provisions of their retirement plan – even provisions such as the matching contribution, plan roll-overs, and the impact of retirement or termination from the company on the retirement account. In most cases, the participant would rather speak to a human resource professional than attempt to find the information in the hundreds of pages of information provided to them through required disclosures.

Prior to this position in human resources, as a lawyer and policymaker in Washington, DC, I was naïve to the impact laws and regulations can have on plan sponsors and participants. And, I now firmly believe that the decades of laws, regulations, and court decisions since the enactment of ERISA in 1974, coupled with a decrease in financial education programs in schools and communities, have caused the

retirement industry to be overly complex and intimidating for a large segment of plan participants. Large employers recognize this trend and have implemented financial education programs to assist plan participants in better understanding their retirement plans, but employers can only do so much when in place are laws, regulations, and legal precedence that impede their ability to educate their employees.

Totality of all Disclosures

With certain required disclosures, for both retirement and health plans, it can be difficult to argue that a single disclosure is burdensome to a plan sponsor to produce or is ineffective in transmitting the necessary information to the plan participant. But, when you combine the totality of all disclosures, plan sponsors have an immense burden upon them to ensure they are following the guidelines for all disclosures. From the individual participant perspective, the immense amount of paper and information that is provided on a benefit plan – not just a single disclosure – is intimidating -- to the point the individual is simply frustrated. We must ask ourselves, are these required disclosures, as a whole, necessary and effective?

It is not difficult to conclude that changes must occur to not only the number of required disclosures, but also the content. I encourage the Council to follow these simple guidelines in the development of recommendations to the DOL: (1) decrease the number of required disclosures (at a minimum, do not increase them); (2) review the cost impact to the plan sponsor of any proposed changes to current disclosures, with the goal of reducing cost; (3) decrease the use of frivolous information in required disclosures; and (4) promote flexible rules on distribution and presentation to allow plan sponsors to tailor the information based on their individual workforce.

The following is my testimony on specific plan disclosures and the distribution of such disclosures.

Summary Plan Description

The Summary Plan Description ("SPD") is intended to be just that, a summary of plan provisions. But, through the years, mainly due to legal precedence that has required plan sponsors to include detailed information (not a summary) in SPDs, the document has evolved into a slightly pared down version of the actual retirement plan document. Is the document valuable to the individual plan participant? Yes, if the information that the individuals seeks can be located. Once the information is located, is it readable? Maybe, it depends on the individual and the topic. Should we make changes to regulations to enable a simplified SPD? Yes, but only if such changes supersede case law that consistently recognized the SPD as a document similar to that of the actual retirement plan document – rather than simply a summary.

As we discuss the streamlining and effectiveness of required plan disclosures, I urge you not to make any recommendations that would create a new required plan disclosure. Between all the federal agencies, due to the numerous rules and regulations in place that plan sponsors must follow, I believe there are now at least 100 required plan disclosures within the employee benefits and compensation arena. The addition of another disclosure only increases the burden and cost on plan sponsors to operate employee benefit plans. I recommend to the Council that in any final report provided to the DOL that required disclosures are decreased or combined. The SPD is a key document that could accept information from other required disclosures as well as be simplified.

Besides the compliance burden, I also mentioned cost. We must remember that the cost to supply communications, including required plan disclosures, can fall to the individual participant. As you may know, plan sponsors may pass on the cost of certain plan expenses to plan participants, including communication materials. And even if costs are borne by the plan they reduce what is otherwise available to provide other benefits to employees. In the interest of the individual participant, as a retirement industry, we should explore policies that would reduce the burden on plan sponsors, while decreasing cost and increasing the effectiveness of the required disclosures. The creation of a Summary or Quick Guide, while it could benefit the individual participant, would only be effective if it was not deemed by the courts as a controlling document – further, it should be in place of the SPD.

If the SPD could be used as originally intended – a summary document and not a controlling document of all plan terms – plan sponsors would have the freedom to provide a document that is tailored to their workforce and inclusive of other financial wellness programs that the employer may provide, or other helpful and meaningful information. For example, a revamped online SPD, could contain links to the basic budgeting tools that the employer may provide within the financial wellness program at the point the document is explaining the employee contribution limits. While nothing is stopping a plan sponsor from this concept now, plan sponsors are fearful of making any alterations or additions to the SPD outside of recognized case law and the regulations that control SPDs. Bottom line, removing the legal barriers in place will spur creativity in the design of the SPD, in hopes of increasing retirement plan awareness to the participants.

Summary Annual Report

For defined contribution plans, such as 401(k) plans, the Summary Annual Report provides individual participants with limited information, thus, it should be eliminated. Information pertaining to plan administrative expenses, information provided on fee disclosure documents, could be incorporated into that document or another required disclosure. Information on how to obtain the annual report for the retirement plan could be information placed on the retirement plan website or as a line on retirement plan participant statements. The Summary Annual Report is an outdated requirement that could easily be streamlined into other documents.

Summary of Material Modifications

Depending on the modification to the retirement plan, the plan sponsor will want to ensure the modification is properly reported to individual participants. But, does that mean the notification must be in a separate document called the Summary of Material Modifications? Not necessarily. To reduce the number of mailings to individual participants and the confusion that causes, and the cost to the plan sponsor or plan participants, this required disclosure represents a document that could easily be incorporated into other communication materials. For example, retirement contribution statements. I encourage the Council to recommend to the DOL to review this disclosure and determine if, based on best practices, it could be eliminated and incorporated into another document. Again, allowing the plan sponsor to determine how best to communicate to its employees results in more effective and meaningful communication and lower costs.

Participant Fee Disclosures

The participant fee disclosure has played an important role in educating participants on the costs associated with individual investments within a retirement plan; however, the disclosure is overly

burdensome to prepare and confusing to the average participant. Due to the complexity of the regulations provided by the DOL, plan sponsors, in conjunction with their recordkeeper, are forced to prepare disclosure documents that contain investment language and information that the average plan participant may not fully understand. This required disclosure, along with the other information provided to individual participants, is intimidating to the average investor. And, due to restrictions on how it is distributed, is not typically presented in a manner that assists a participant in selecting the right investments. Rather than require a separate document, most of the information could be included in an SPD (if the SPD was able to be revamped into a simpler document). Or, in the alternative, the information could be provided via electronic means, located on the retirement plan website along with other information on a particular fund – such, as the rate of return.

Distribution of Required Disclosures

While I respect the Council's reasoning to not focus entirely on the distribution options of required plan disclosures, I believe the dissemination of these disclosures will assist in making them more effective. We now live in an age in which a large segment of our population either uses the internet for work or has access to it at home. In addition, the number of Americans with a smartphone increases each year. While email is still a primary source of communication, we have reached a point in which the younger generation prefers text messages or other social media platforms to communicate. While technology improves, with a direct impact on the channels of communication, the DOL rules on distribution of notices remains behind the times. Distribution rules that favor electronic dissemination would provide a plan sponsor with the flexibility to enhance the disclosures to include interactive features that could help participants understand the materials, and allow for inclusion of other relevant information to the plan participant in the same communication or on the same website. In addition, a focus on electronic distribution would reduce costs to both the plan sponsor and the plan participants. I encourage the Council to recommend to the DOL to determine ways to promote electronic disclosure of materials. At a minimum, electronic disclosure should be the default option, rather than paper when an employer has an employee's email address. One example, which is a step in the direction of electronic disclosure, is the e-proxy system utilized by the Securities & Exchange Commission since 2007. This system allows a company to mail a postcard to shareholders with information on how to obtain required documents on a website.

Conclusion

Thank you for the opportunity to testify today on enhancing the effectiveness of required plan disclosures for both plan participants and sponsors. As it becomes more difficult and costly to operate a retirement plan due to increasing regulations and an onslaught of litigation against plan sponsors, it is imperative to determine measures to ease the administrative burden while enhancing the participant experience. I look forward to answering your questions.

Will Hansen
Senior Vice President, Retirement & Compensation Policy
The ERISA Industry Committee ("ERIC")

ERIC The ERISA Industry Committee

Driven By and For Large Employers

1400 L Street, NW, Suite 350, Washington, DC 20005 • (202) 789-1400 • www.eric.org

Reducing the Burden and Increasing the Effectiveness of Mandated Disclosures with respect to Employment-Based Health Benefit Plans in the Private Sector

Testimony before the Advisory Council on Employee Welfare and Pension Benefit Plans
U.S. Department of Labor
Washington, D.C.

June 7th, 2017

Introduction

Chairs Tully and Stein, honored members of the ERISA Advisory Council ("the Council"), thank you for this opportunity to testify. I'm James Gelfand, Senior Vice President for Health Policy at The ERISA Industry Committee (ERIC). We appreciate the opportunity to share the concerns of large plan sponsors. ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. Our member companies voluntarily offer health and welfare benefits, as well as retirement benefits, to many millions of Americans, and it is our hope that the Administration will explore and operationalize ways to reduce the heavy burdens currently associated with sponsoring benefits for workers, retirees, and their families. On behalf of our large employer members, we respectfully request that you do all you can to reduce the regulatory and compliance burdens associated with plan disclosure requirements imposed on plan sponsors, as every dollar spent on needless paperwork is a dollar that is not available to maintain or enhance benefits.

As you know, the regulatory burden is significant for plan sponsors. Some of the information plan sponsors are required to furnish to plan beneficiaries is of great value to said beneficiaries, but often times the information is unnecessary, repetitive, overly complicated, unwanted, or presented (as required) in a way that is virtually incomprehensible to the average worker. Over the past two days you have heard testimony from numerous sources who laid out some of the challenges in this space, itemized many of the mandatory participant disclosures, and suggested solutions that could balance the need to keep beneficiaries well-informed, with the equally important need not to overload either plan sponsors or beneficiaries with red tape, unnecessary costs, or reams of paper. ERIC supports your efforts and those of the other witnesses, and appreciates the opportunity to weigh in.

Plan sponsors have long endeavored to abide by the varied and myriad disclosure rules associated with the administration of health and welfare plans, including (among others) those required by the Employee Retirement Income Security Act (ERISA), the Patient Protection and Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act (HIPAA), the Women's Health and Cancer Rights Act (WHCRA), the Newborns' and Mothers' Health Protection Act, the Personal Responsibility and Work Opportunity Reconciliation Act, the Mental Health Parity Act (MHP), the Medicare Prescription Drug Improvement and Modernization Act (MMA), the Consolidated Omnibus Budget Reconciliation Act (COBRA), the Children's Health Insurance Program Reauthorization Act (CHIPRA), and more.

Some of these are governed by the Department of Labor (DOL), others by the Department of the Treasury, and others by the Department of Health and Human Services (HHS) – in particular, requirements under the ACA tend to be the result of "tri-agency" rules developed by all three. For the purposes of this testimony, know that I am focused on those requirements overseen by DOL. But please keep in mind that these should not be viewed in a vacuum, because plan sponsors must abide by the full universe of requirements. In fact, some of the most onerous requirements are a result of HHS rules, including some of those that bury participants in the biggest piles of unnecessary paperwork, like the section 1557 nondiscrimination rules and their infamous tagline requirements. Nevertheless, we appreciate the scope of the Council's jurisdiction and focus, and will merely note that there is a lot on plan sponsors' minds that we will largely gloss over here – and hope that the Council takes a broad interpretation of the mission and includes those regulatory requirements in which DOL participates but may not be the sole participant.

My remarks today will focus on the Summary Annual Report (SAR) associated with health and wellness plans, the need to consolidate, streamline, and combine numerous annual notice requirements, and the Council's proposal to transform the Summary Plan Description (SPD) into a user-friendly tool for plan beneficiaries.

The Summary Annual Report

As you know, every year, plan sponsors complete a highly complicated and detailed disclosure known as the Form 5500, which is reported to DOL's Employee Benefits Security Administration (EBSA). This is a difficult and time-consuming enough task that a good proportion of large employers tend to pay expert vendors, some of whom you've already heard from yesterday and today, to help complete them. You are no doubt aware that DOL has proposed drastically expanding the scope of Form 5500, as well as adding on a new "Schedule J" that would require significantly more detail about an employer's health plans. ERIC has filed extensive comments on this proposal, but I would like to begin by summing our comments up in two words: ***Please don't***.

We urged DOL not to undertake this massive expansion of Form 5500 for many reasons. First, we don't believe the government needs this information. Second, some of it is available elsewhere. Third, it would be extremely costly and administratively burdensome to compile in the required format and manner. And fourth it does not provide useful information for plan beneficiaries. ERIC members believe that before DOL increases 5500 reporting requirements, the agency must first look to ways to make the compilation, presentation and distribution of the current Form 5500 less burdensome for plan sponsors and more meaningful for plan participants.

But aside from the 5500 itself, this annual undertaking is currently required to be accompanied by a Summary Annual Report (SAR), a narrative document that attempts to simplify the information included in Form 5500 and furnish it in a more readable manner to plan participants. One thing that is abundantly clear is that the SAR fails in this purpose.

Particularly for health and welfare plans, it is difficult to discern the value a SAR provides to plan enrollees. For details on what the plan entails, they have the Summary Plan Document (SPD) or the Summary of Benefits and Coverage (SBC) – and many plan sponsors believe the SBC itself is duplicative and is not useful to beneficiaries. In the past, the Council has heard from witnesses who believed that the SAR was a necessary tool to help plan beneficiaries understand a plan's ability to fund claims and the overall financial situation of the plan and the plan sponsor. We question whether plan beneficiaries

would desire this data, whether they would be able to interpret a SAR in such a way that elucidates said information, and whether the relatively tiny number of plan participants who might want or need such information, would justify the overall SAR requirement.

Like the great strides that employers have made to support the health and well-being of their employees and families, today plan sponsors are also struggling with a newer employee benefits focus: financial wellness. Employers want to provide employees with the peace of mind associated with financial stability and planning, and provide for them tools to support their financial wellness, in addition of course to the valuable voluntary retirement and pension benefits offered by large employers. Employers have found a woeful gap of financial literacy among employees, and are working to address it. But this begs the question, are most plan beneficiaries likely to have an understanding of stop-loss insurance, attachment points, fees charged by Third Party Administrators (TPAs) and other plan vendors, or the actuarial calculations required to determine plan premiums and estimate overall plan costs? Is even your average economist or actuary likely to find this light reading? If not, why are we sending this information to people who don't want or need it, likely do not understand it, and may in fact be confused, irritated, or possibly unduly alarmed by it?

ERIC believes that going forward, health benefit plans should no longer be required to furnish SARs to beneficiaries. This will not result in a lack of data about beneficiaries' plans; rather, it will relieve them from one more mystifying document in the already gargantuan pile of notices and paper they receive every year in association with their benefits. There are many other disclosures and forms that employees receive that can help them understand their benefits, and if they need data about their employers' or their plans' finances, there are appropriate avenues for those to be obtained as well. In fact, a simple internet search may provide more user-friendly and useful data than a SAR, depending on exactly what an employee is looking for.

In the very least, DOL should suspend the SAR requirement for health benefit plans, and see if any complications arise as a result – if not, the SAR requirement could be completely ended, and if some unforeseen problems do arise, DOL should consider if there is a way to remedy them without bringing back yet another disclosure requirement. The best way to confirm that the SAR is no longer needed, is to move forward with a relaxing of the requirement, and let nature take its course. Large employers have a lot of experience communicating with their employees and try many avenues and approaches to ensure that employees receive the information they need and desire. One-size-fits-all federal mandates do not result in better communication.

Consolidation of Annual Notices

Earlier, we ran through a number of the statutes that require plan sponsors to send various notices and disclosures to plan beneficiaries. Some of these annual disclosures include critical information such as how a plan works, what the benefits are, how to obtain them, and what to do if a claim is denied. Other notices serve only to inform plan beneficiaries about the rules a plan must follow (for instance WHCRA notice annually, or inclusion of the hospital stay after birth notice in the SPD). Some disclosures are intended to be more readable versions of others – for instance, the Summary of Benefits and Coverage (SBC) is a simplified SPD, with a couple examples of what a plan enrollee might experience financially. There are notices that simply restate info from the SPD, such as whether an employee might be eligible for an employer contribution to an account-based plan. Other notices are intended to make beneficiaries or enrollees aware of government benefits that may potentially be available to them.

Some notices (for instance HIPAA privacy practices) are only required every three years, rather than annually. And this is just a sampling.

The most straightforward way to streamline all of these notices would simply be to give employers the option to put them all online, in one centralized place, where employees could access them at will. We are aware that the purpose of this endeavor by the Council is to focus on the information contained in disclosures, rather than means of delivery, but the fact remains that much of the problem, the costs, and the confusion could be solved by allowing it all to be put together online – especially now that the vast majority of health plan beneficiaries have access to their own personal computers and mobile electronic devices connected to the internet, including seniors and those on the lower end of the economic spectrum. We have heard that DOL is currently exploring solutions related to electronic delivery, and we applaud the effort. Perhaps a good deal of relief and better communications are only a click away.

However, for the time being, it is still highly worthwhile to consider options to streamline the look, packaging, and delivery of annual notices. As such, we believe it would be in the best interests of both plan sponsors and plan beneficiaries for DOL to do a comprehensive review of all DOL's exclusive as well as multi-agency beneficiary disclosure requirements, and submit a report to the Secretary. Said review should evaluate each piece of information required, in each disclosure, and ask a number of questions, including but not limited to: Is this information specifically required by statute to be furnished? Would this information be useful to most beneficiaries? What are the pros and cons of providing this information, in addition to all the other information that will be provided? Is this the only requirement that asks for this information, or is the same information required to be furnished multiple times, in multiple ways, every year? How likely is this information to confuse beneficiaries, or to cause them to overlook important information elsewhere due to being "buried in paper or information"? Can this information be combined with other information elsewhere, or be eliminated due to repetition or lack of practical use to plan beneficiaries? Does this information serve to inform of the obvious, or to restate a legal requirement that is already posted on a government website (and likely reflected in plan documents, unless the plan is in violation of the law)?

We believe this review would produce an action plan that going forward could result in beneficiaries receiving the right information, at the right times, and in the right format, and also begin to eliminate some of the unnecessary disclosures – or at least some of the unnecessary parts of them – that cost plan sponsors time and headache, confuse and irritate plan beneficiaries, and prevent more important information from being obtained by those who actually need it. Through the course of this review, DOL should obtain input from the Council, plan sponsors, beneficiary representatives, service providers, vendors, and other critical stakeholders, all of which should be reflected in the final report. Based upon the report, the Secretary could then direct DOL to engage in the necessary requirement withdrawals, rewrites, and consolidations envisioned by the Council, plan sponsors, and others.

We urge the Council to advise the Secretary to direct such a review to be undertaken, and look forward to working with DOL to pursue a timely and productive conclusion and final product.

Proposed SPD Modifications

The Council has also asked that witnesses comment on a proposed revamp of the SPD, transforming it into primarily a reference tool that could be used by plan beneficiaries to understand their plans. ERIC

members have concerns about this proposal, for a number of reasons. As such, we would ask the Council to set this proposal aside for further study.

As you know, the SPD is required to be written in such a way that the average participant can sufficiently understand their benefits, rights, and obligations under the plan. It is true that over time SPDs have gotten more comprehensive – much more – and this is in no small part because of disagreements that have arisen about the scope of plans. When disagreements between plan sponsors and beneficiaries have been adjudicated by courts of law, judges have often chosen to rely upon the terms of the plan as indicated in the SPD. Because of this, most plan sponsors are loathe not to include as thorough a description of the benefit as possible. We understand that the Council may view this thoroughness as a challenge for participants and beneficiaries, as it may provide more information in one place than they want, or it may require inclusion of some information that is medical in nature. Especially as it pertains to financial aspects of a plan and treatment specifications and requirements, this level of specificity is extremely important not just to plan sponsors, but to every beneficiary. After all, when the scope of a plan is expanded by a court due to a lack of specificity, every plan beneficiary will experience higher costs due to additional claims being paid. And likewise, the SPD is integral in helping beneficiaries understand the terms of value-driven plan designs, including the use of centers of excellence, high-performance networks, medication management, and other innovations designed to guide participants to better health and increased financial savings.

If the SPD was to be reimagined as a reference tool that guided plan participants to appropriate "source materials," it would be critical that these reference materials were relied upon by the courts to explain the scope of benefits and requirements under a plan. And if what today is known as an SPD becomes said source material, the Council must know that the creation of a new navigation tool could have some costs, which are likely to be borne by plan participants. The utility of this tool, compared to that of the current SPD, would depend highly upon who chooses to use it, in what way, and whether or not it continued the important legal protections currently conferred upon plan participants and sponsors by having the full scope of the benefit explained in one central place, acknowledged by the government.

If these challenges can be worked out, this proposal may be a positive step forward. But the possibilities must first be exhausted to ensure that neither beneficiaries nor sponsors are burdened by unintended adverse consequences, and that this is the most efficient, effective, and cost-neutral approach to meeting the Council's goals. It will be critical to recognize the importance of a technology-neutral approach that is not overly prescriptive, in order that any new requirement or tool can live and grow and keep up with the times, as well as with the evolving needs of participants and plan sponsors.

Conclusion

Members of the Council, thank you again for the opportunity to participate today, and for your interest in reducing the burdens upon plan sponsors while also ensuring that plan participants have access to the most relevant, clear, concise data they may need pertaining to their health and welfare benefits. ERIC is eager to work with you, and with DOL, to advance your vision to eliminate unnecessary disclosure requirements, to streamline those requirements that do add value for participants, and to ensure that the information furnished to beneficiaries is readable, useful, and reliable. I look forward to your questions, and to continuing this important conversation beyond the scope of this meeting.