

December 26, 2019

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

**RE: Comments on Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA, 84 FR 56894 (October 23, 2019)
RIN 1210-AB90**

Dear Assistant Secretary Rutledge:

The ERISA Industry Committee (ERIC) appreciates the opportunity to provide a response to the United States Department of Labor (Department's) Request for Information (RFI) made in conjunction with the proposed rule for "Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA" (Default Electronic Disclosure Rule) issued by the Department and published in the Federal Register on October 23, 2019.

ERIC has a strong interest in the RFI because the questions relate to the efficiency and accuracy of the distribution of benefit plan communications and participant access to such communications. ERIC is very supportive of the Department's efforts to improve such efficiencies and facilitate participant access to plan information. 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. With member companies that are leaders in every sector of the economy, ERIC is the voice of large employer plan sponsors on public policies impacting their ability to sponsor benefit plans for active and retired workers, as well as families. ERIC supports the ability of its large employer member companies to tailor retirement, health, and compensation benefits to meet the unique needs of their workforces and has a strong interest in policies that impact the ability of employers to provide effective and cost-efficient retirement and health care programs to millions of workers, retirees, and their families. As such, ERIC has a vested interest in the RFI and is well-positioned to provide helpful information.

As addressed in my November 22, 2019 [letter](#), the Department's Default Electronic Disclosure Rule is an important step toward the goal of improving communications to participants, and ERIC encourages the Department to move forward on that rule promptly. Electronic communication will provide more efficient disclosures that will aid participants by providing a central repository for plan documents and allowing participants to access documents when they need them. Also, electronic disclosure can allow plan sponsors to "layer"

information in notices by using hyperlinks and embedded links. And while plans do expect cost savings, the true benefit is creating greater access to information for plan participants.

While ERIC is supportive of the RFI and happy to provide information, the Department should not slow finalization of the Default Electronic Disclosure Rule while it resolves all of the questions in the RFI. Doing so will delay the many benefits of the Default Electronic Disclosure Rule for participants. In addition, as I noted in my November 22, 2019 letter, a number of the questions in the RFI could be answered more accurately once there is a final rule allowing for electronic disclosure as the default option.

ERIC provides responses to each RFI question below. ERIC's answers reflect its long-held support for all agency efforts to simplify plan notices, including by eliminating unnecessary and redundant disclosures. ERIC agrees that a number of the disclosures required under ERISA are too voluminous, complex or both. In the experience of ERIC's member companies, participants can be less likely to consider and engage in (or even read) a document that is too voluminous, too complex, or too frequent. Such documents lead to participant overload and inertia, with participant becoming less likely to understand, engage with or maximize their employee benefits. This result is very concerning to ERIC's member companies, and for that reason, ERIC strongly encourages the Department to refine or remove a number of the currently required disclosures. ERIC is particularly concerned with the following documents, for reasons discussed below: the Annual Funding Notice, the Summary Annual Report, participant fee disclosures, plan fee disclosures and Schedule C reporting. ERIC believes that these documents require simplification and, in some cases, elimination.

The Department's effort to address these concerns will certainly be enhanced by coordination with the Treasury Department and the Internal Revenue Service (IRS). For that reason, ERIC strongly recommends that the Department consider coordination with these agencies as well as with the Pension Benefit Guaranty Corporation (PBGC) and other relevant agencies.

With those guiding principles, ERIC has the following responses to the RFI questions:

1. What is the best way to measure the effectiveness of a disclosure? Should participant engagement or attentiveness to plan affairs be a measure of the effectiveness of mandated disclosures? If so, how can the Department have the most meaningful impact on engagement through mandated disclosures? Are there factors other than design, delivery, and content that should be considered by the Department? Please direct the Department's attention to relevant research and evidence that illuminates how and to what degree plan disclosures can be made more effective, and how regulation (or deregulation) can best promote effective disclosure.

ERIC believes that the most effective disclosure documents result in more individuals enrolling in available employee benefits, engaging in benefits-related decision-making and maximizing their available benefits (such as by increasing retirement savings). When ERIC's member companies issue communications, they do so with an eye to all three goals. From ERIC's perspective, effective disclosures support those three goals.

For the many reasons stated in my November 22, 2019 letter, ERIC believes that electronic communications are best suited to facilitate these three goals. For example, a number of studies point to electronic communications as having a “nudging” effect, specifically nudging more participants into increased deferral rates, improved savings and investment returns and, consequently, a more secure retirement.¹ For that reason, ERIC encourages the Department to finalize the Default Electronic Disclosure Rule as quickly as possible, and to do so in the manner described in my November 22, 2019 letter, as this rule will go a long way toward improving the effectiveness of plan communications.

With respect to testing, ERIC believes that there can be a range of methods to test whether a communication achieves the three above-noted goals. For example, one ERIC member company indicated that it has used a communication consulting practice to test the effectiveness of its notices. ERIC also expects that there may be academic and industry research on this issue. Nonetheless, ERIC does not recommend mandatory testing and recommends that plan sponsors be able to maintain flexibility in determining the most effective communications.

ERIC is supportive of efforts by the Department to engage in such research and/or testing. In ERIC’s view, the best way for the Department to do so is to by conducting academic and industry research, and/or by having an organization experienced in such testing conducting a test using standard sample disclosures on a diverse group of volunteers. ERIC does not object to the Department engaging in this type of research or testing.

However, in ERIC’s experience, it can be challenging, burdensome and expensive for plan administrators to solicit and obtain this type of information (for example, for an employer with a large and diverse workforce to identify an appropriate sample of the participant population, to obtain their cooperation, to obtain and compile the data, etc.). This type of research and outreach is best suited for a government agency rather than individual plan administrators.

2. How do or could plan sponsors and administrators assess the use, effectiveness, and impact of disclosures? What are the findings of these assessments? What actions are taken in response to such assessments? Should assessments and responses be required by regulation, either together with or as an alternative to prescriptive standards for disclosures?

As noted above, plan administrators are generally not equipped to do this type of follow-up research, and ERIC strongly discourages any mandate imposed on plan sponsors or plan administrators to do so.

3. Please identify any currently mandated routine retirement plan disclosures for which effectiveness and efficiency could be improved and set forth

¹ Default Electronic Deliver Works: Evidence of Improved Participant Outcomes from Electronic Delivery of Retirement Plan Documents, HXH, Quantria Strategies, Prepared for the Spark Institute, November 2019, pp. 29-34.

recommendations for improvement. Please explain why the particular disclosure needs improvement.

In response to this question and other questions in this RFI, ERIC has identified the following disclosures as being appropriate for improvement and/or elimination. In considering this list, ERIC urges the Department to consider not only refining certain disclosures, but also eliminating others. This includes that the Department should evaluate whether a disclosure materially helps in achieving the three goals noted above (more individuals enrolling in available employee benefits, engagement in benefits-related decision-making and maximization of benefits). The Department should think critically about the true utility of the disclosure, the likelihood that most participants will understand it or find it helpful, and the burden and cost of providing it. ERIC believes that for some of the below disclosures the answer is no, and the disclosure should be substantially revised or even eliminated.

- Defined Benefit Commencement Paperwork. ERIC is concerned about the complexity and volume of documents that are required to be provided when a participant applies for his or her retirement benefits under a defined benefit pension plan. In addition to the forms that need to be completed (by both the participant and a spouse), that package also must include information about the various forms of distribution available, relative value disclosures, disclosures regarding the impact of failure to defer, and a voluminous and complicated “402(f)” notice on tax withholding and rollovers (among other materials). The resulting “package” goes on for many pages, and in the experience of ERIC’s member companies can be intimidating to the participant. The length and complexity of the package may explain why so many participants otherwise eligible to commence distributions fail to do so (which is an issue of concern for both ERIC and the Department).
- Annual Funding Notice. The Annual Funding Notice contains a significant amount of detailed information regarding funded status and PBGC guarantees that, ERIC suspects, provides little or no actionable information for participants and serves mostly to confuse or unduly alarm them. In its 2017 report, the Advisory Council on Employee Welfare and Pension Benefit Plans (the Advisory Council) identified the Annual Funding Notice as “complex and difficult to understand” and “more confusing than helpful.”² ERIC agrees and recommends that the Department either support the repeal of ERISA Section 101(f) or consider format changes, including those identified by the Advisory Council.
- Summary Annual Report. The Advisory Council described the Summary Annual Report as “lack[ing] any actionable value to participants since, as a mere summary of the more detailed Form 5500, it contains no information that is relevant to the individual’s defined contribution account.”³ ERIC agrees and recommends that the Department either

² Mandated Disclosure for Retirement Plans—Enhancing Effectiveness for Participants and Sponsors, ERISA Advisory Council, p. 18 (Nov. 2017).

³ *Id.* at 23.

support the repeal of ERISA Section 104(b)(3) or consider format changes, including those identified by the Advisory Council.

- Participant Fee Disclosures (under 29 C.F.R. § 2550.404a-5). The Advisory Council described the 404a-5 disclosures as not being read by participants, confusing and required too frequently (without that frequency enhancing their usefulness).⁴ ERIC agrees and recommends that the Department consider simplifying format changes, including certain simplifying changes suggested by the Advisory Council. ERIC also suggests that the Department consider reducing the frequency of the disclosure. The disclosure is required annually (and in some cases quarterly), which is likely more frequent than desired by participants, especially given the nature of the disclosed information.
- Plan Fee Disclosure under 29 C.F.R. § 2550.408b-2. Although not a disclosure received by participants, ERIC recommends that the Department move forward on changes to the 408(b)(2) disclosures. In particular, ERIC supports the implementation of a model format or guide to make the 408(b)(2) disclosure easier for plan administrators to receive and follow. Under the current regulation, covered service providers are permitted to make the disclosure in multiple documents and are not required to provide a guide. This often results in disclosures being made across multiple documents, which puts the burden on plan administrators to piece together the relevant disclosure. The problem is made more difficult because the duty to disclose certain information required to be disclosed under 29 C.F.R. § 2550.408b-2 is only triggered upon a change; when a change occurs and a notice is not sent to the plan, the plan administrator may not know that a required notice was not sent. In short, the current 408(b)(2) disclosure can be improved and made more efficient by encouraging the use of a single disclosure or guide. Although not directly received by plan participants, these improvements will help plan administrators make disclosures to participants, including through the 404a-5 disclosures.
- Inconsistencies Between the 404a-5 disclosures and Schedule C reporting. In a 2013 report on retirement plan reporting,⁵ the Government Accountability Office (GAO) noted a problem with “inconsistency between information reported on fees by service providers to sponsors and information sponsors are required to report on the Form 5500 schedule C.” The inconsistencies were identified as including “inconsistent definitions across the two reports”; “while both reports require information on service providers and indirect compensation, these terms are defined differently in the two reports.”⁶ The report indicated that “Labor officials said the agency has received requests to change schedule C to better harmonize these requirements and is considering doing so.”⁷ ERIC

⁴ *Id.* at 27-28.

⁵ GAO–14–92, *Private Pensions: Clarity of Required Reports and Disclosures Could Be Improved*, p. 20, GAO (Nov. 2013).

⁶ *Id.* at 20.

⁷ *Id.* at 21.

agrees with this concern and supports any efforts by the Department to harmonize these two documents.

4. Would more personalized disclosure enhance engagement? If so, how?

ERIC presumes that more personalized disclosure would enhance participant engagement by making the communication more relevant to the individual participant and thus more likely to be read with interest.

However, this enhancement must be balanced against the costs and administrative burdens associated with trying to customize communications for large employer plans, which have tens or hundreds of thousands of participants. A better approach would be to offer participants technology tools that will permit them to obtain customized information or disclosures if they wish (such as modeling software that allows the participant to determine his or her projected account balance at retirement based upon individual variables, such as projected retirement date, savings rate and desired investment risk). Also, the Department could encourage generalized disclosures that cover a wide range of participant experience, such as using the Summary Plan Description to address particular common situations (for example “what happens to my account balance if I die while employed?”, “what happens if I become disabled while employed?”, etc.).

More generally, as explained in my November 22, 2019 letter, ERIC is concerned about requirements that become out of date as technology evolves in rapid and unexpected ways. ERIC’s membership found this to be a problem with the 2002 safe harbor (29 C.F.R. § 2520.104b-1(c), herein 2002 Safe Harbor). Between 2002 and 2019, electronic devices and capabilities evolved quickly, dramatically and, in some cases, in unexpected fashion. These changes made the 2002 Safe Harbor increasingly less useful. It is important that any disclosure requirements—including personalization requirements—be flexible to allow for evolving technology. One ERIC member company that is in the plan recordkeeping business has found that the risk of a disclosure mandate becoming out of date increases with each underlying detailed requirement. This will be true with personalization requirements. The more personalization requirements, and the greater the detail level on those requirements (such as personalized calculators, personalized text, personalized content, etc.), the greater the risk of the standard becoming out of date as technology evolves. This ERIC member company also observed that the more requirements in a disclosure, including the more personalized requirements, the more likely the plan will be stifled from innovation and will be forced, by administrative necessity, to put the disclosure in paper format.

ERIC’s member companies express a similar concern with model disclosures. While model disclosures can be helpful as a guide, they become less useful if they are too particular. One ERIC member company gave the example of a model that refers to “an HR office.” If the plan sponsor does not have an HR office, that language cannot be used. Accordingly, while ERIC welcomes model language, it cautions the Department from models that are too specific or restrictive or fail to allow for evolution (especially technology evolution).

5. Are there ways through regulation or appropriate sub-regulatory guidance to require, incentivize, or facilitate plan administrators to organize information within

the required disclosures to reflect life events so that information is available as the need arises?

The best way for the Department to help facilitate disclosures that “reflect life events” and provide information “as the need arises” is by supporting electronic disclosure and, particularly, the website posting approach in the Default Electronic Disclosure Rule. With an expanded Default Electronic Disclosure Rule, the Department will make it easier for plan sponsors to use electronic communications that will, in turn, facilitate disclosures that are timely and accessible to participants at all times. For that reason, ERIC encourages the Department to finalize the Default Electronic Disclosure Rule as quickly as possible, and to do so in the manner described in my November 22, 2019 letter, including extending the rule to welfare plans and treating website posting as the default over paper communications.

In addition, ERIC cautions the Department against mandates that require customized information targeted at individuals’ “real time” circumstances for the reasons stated in response to Question 4. Instead, as stated above, the Department should help support tools that permit participants to generate personalized information and encourage generalized disclosures that cover a wide range of participant experience.

6. Some people have indicated that at least some ERISA documents may be too voluminous, complex, or both. These individuals highlight a need to strike a balance between providing too little information for participants to gain an adequate understanding of what the disclosure is trying to convey and providing too much information, which can become overwhelming and confusing. Please identify each ERISA document in these categories.

ERIC agrees that a number of the disclosures required under ERISA are too voluminous, complex or both, and agrees that participants can be less likely to consider and engage (or even read) a document that is too voluminous or complex. In the experience of ERIC’s member companies, when a participant receives a disclosure that is too long or complex (or sent too frequently), the participant experiences information overload and inertia. The participant becomes inured to receiving such disclosures and may overlook or not read (or read as carefully) a document that may require participant action (such as a blackout notice or a notice of an approaching deadline, such as the Required Beginning Date). In ERIC’s experience, all three problems result in participants becoming less likely to consider, engage in or maximize their employee benefits.⁸ This result is very concerning to ERIC’s member companies, and for

⁸ This participant paralysis is described well in the GAO report:

“While requiring fiduciaries to disclose financial information about the plan may serve accountability purposes, as noted by a Labor official testifying before the [Advisory Council], the quantity of disclosures creates significant communication challenges as participants struggle with what they must or should read. For example, participants may receive a disclosure offering them an opportunity to comment on whether their plan should be tax-qualified, another notifying them that the plan has applied for a waiver of the minimum funding standard, and a summary annual report or annual funding notice providing annual plan-wide statistics. In addition, an academic researcher observed that participants do not understand what information is most relevant to their investment choices. Based on such testimony, the EAC

that reason ERIC strongly encourages the Department to evaluate and refine (or remove) disclosures that are too voluminous, complex, or both (and as discussed below, repetitive or sent too frequently).

ERIC identifies specific documents of concern (and the reason for concern and its recommended action) in its response to Question 3.

7. With respect to each document identified in the previous question, state whether the Department should encourage or require, as an alternative to furnishing the entire document, that the plan administrator furnish a brief, clear, and accurate summary of key information from the document, for example not to exceed one or two pages, coupled with access to more detailed information online, on request, or both. Also identify what should be considered “key” for this purpose. To illustrate this concept, readers are directed to the 2017 ERISA Advisory Council Report.

ERIC supports this idea of a guide for certain disclosures that are determined to be necessary, but that are so detailed and voluminous that participants may find them difficult to read (e.g., a pension distribution package), including the concept of a document “key” as described in the 2017 ERISA Advisory Council Report. But ERIC still encourages the Department to consider whether certain disclosures should simply be eliminated in full because they are obsolete or otherwise unhelpful to participants.

ERIC identifies specific documents of concern (and the reason for concern and its recommended action) in its response to Question 3. In addition to the documents addressed in Question 3, ERIC agrees that a guide could be helpful for other documents (that ERIC does not currently view as needing refinement) such as Summary Plan Descriptions and 404a-5 Participant Fee Disclosures.

8. Does ERISA require disclosure of any information that has become obsolete, for example as a result of the passage of time or changes in the regulatory, business, or technological environment? If so, what information? Is there information that would be important to disclose instead of the obsolete information?

concluded in 2009 that disclosures often go unread because participants feel overwhelmed by too much information.

Our interviews with various group [sic] echoed these concerns. One participant advocate said participants are being “flooded” with information from their plans, and an association representative commented that there is too much information for it to be useful to participants. A service provider noted that at retirement, participants get at least 20 pieces of paper, which is too much information to read and act on. According to several groups we spoke with, the quantity of information diminishes the positive effects it can have for participants. Service providers and associations said participants may miss important information because they have to read through such a large quantity of other content to find it, and many participants rarely read the disclosures they receive.”

Id. at 29.

ERIC agrees in general that some ERISA documents are obsolete and that such documents contribute to participant information overload and increased plan administrative costs, without providing value to participants. In ERIC's experience, such information overload results in participants being less likely to consider, engage in or maximize their employee benefits. This result is very concerning to ERIC's member companies, and for that reason, ERIC strongly encourages the Department to evaluate and refine (or remove) disclosures that are obsolete.

ERIC identifies specific documents of concern (and the reason for concern and its recommended action) in its response to Question 3.

In addition, for the reasons stated at length in my November 22, 2019 letter, ERIC reminds the Department that the continued treatment of paper as a default communication format is in-and-of-itself obsolete (and will become more so in the coming years). For that reason, ERIC encourages the Department to finalize the Default Electronic Disclosure Rule as quickly as possible, and to do so in the manner described in my November 22, 2019 letter, including to shift the default communication method to electronic communication, and particularly website posting, rather than paper as the default.

9. Is there redundant or inconsistent information disclosed to participants under current rules? If so, which information?

ERIC agrees that there are certain required disclosures that are redundant. As described in Question 3, a good example is the Summary Annual Report, which is redundant to the Form 5500. Such redundancies contribute to participant information overload and plan administrative costs, without providing value to participants. In ERIC's experience, this information overload results in participants becoming less likely to consider, engage in or maximize their employee benefits. This result is very concerning to ERIC's member companies, and for that reason, ERIC strongly encourages the Department to evaluate and refine (or remove) disclosures that are redundant.

ERIC identifies specific documents of concern (and the reason for concern and its recommended action) in its response to Question 3.

10. Is the problem that there are too many disclosures, or that there is too much information that is disclosed, or both? Would it be feasible, and advisable, to condense and streamline information into fewer disclosures or less voluminous disclosures, rather than eliminating disclosure of certain information?

ERIC's view is that both are problems: there are too many required disclosures and many of those documents are overly long or complex. There are also disclosures that are required too frequently.

On the first point, too many disclosures, the 2013 GAO report "identified more than 60 different disclosures to participants that pension plan sponsors may be required to provide, depending on

their plans' type, size, and circumstances."⁹ Many of these disclosures are required frequently, such as every quarter or every year. And as discussed above, ERIC finds that certain of these disclosures are too confusing or overly complex.

As indicated above, ERIC's experience is that all three problems result in participants becoming less likely to consider, engage in or maximize their employee benefits. This result is very concerning to ERIC's member companies, and for that reason, ERIC strongly encourages the Department to evaluate and refine (or remove) disclosures that suffer any of the above problems.

With respect to all three challenges, ERIC identifies specific documents of concern (and the reason for concern and its recommended action) in its response to Question 3.

With respect to the specific challenge of too many and too frequent disclosures, ERIC believes this is another reason that the Department should finalize the Default Electronic Disclosure Rule as quickly as possible, and in the manner described in my November 22, 2019 letter. With an expanded Default Electronic Disclosure Rule, the Department will make it easier for participants to access only the information that the participant is most interested in. This will diminish the problem of information overload. The expanded Default Electronic Disclosure Rule will also permit consolidation by allowing plan sponsors to consolidate the "Notice of Internet Availability." This will also help reduce the amount, and frequency, of information delivered to participants.

11. To what degree does the design of disclosures (as opposed to their content) impact the likelihood that participants will read and understand the information disclosed? Are there design elements or tools that are particularly effective? For example, should certain information be presented in a question-and-answer (Q&A) format? Are larger font sizes, greater use of white spaces, colors, or visuals, or the use of audio or video potentially helpful? Would it be appropriate for the Department to require particular design elements for all plans (e.g., including small plans, retirement and welfare plans, defined contribution and defined benefit plan, etc.)?

ERIC expects that the format of the disclosure can impact the likelihood that participants will read and understand the information disclosed. For example, ERIC expects that a simpler format, with clearer language, will be more accessible to the participant, and therefore more likely to be read and understood. ERIC is not averse to efforts by the Department to engage in studies or testing regarding the formats that improve the participant's interaction with the disclosure.

However, for the reasons stated above, including in response to Question 4, ERIC cautions the Department against using mandatory formats that can be difficult to administer and/or quickly

⁹ GAO-14-92, Private Pensions: Clarity of Required Reports and Disclosures Could Be Improved, p. 20, GAO (Nov. 2013), p. 27.

become out of date. Also, such mandatory formats can inhibit communication innovations that can benefit participants.

Instead, ERIC encourages the Department to think about ways that it can facilitate innovation in the presentation of information in order to improve participant understanding of and access to information. The best way the Department could support such innovation is by finalizing the Default Electronic Disclosure Rule as quickly as possible and in the manner described in my November 22, 2019 letter. With an expanded Default Electronic Disclosure Rule, the Department will make it easier for plan sponsors to make innovations that improve plan communications and participant access to plan information. For example, the 2017 Advisory Council Report identifies a number of ways in which electronic disclosures allow for innovation, such as through the use of increased content navigability, layered or nested information presentation, and enhanced user interaction features.¹⁰

12. Are there additional or better standards for improving the readability of the content in disclosures than the Department's general standard—i.e., that documents must be written in a manner calculated to be understood by the average plan participant?

As noted, ERIC could envision there being helpful research or testing as to participant understanding. ERIC could also envision those processes testing alternative forms of notice using some of the above-described techniques. ERIC is not adverse to the Department engaging in such studies or testing.

But again, ERIC cautions the Department from imposing such testing responsibilities on plans that lack the resources for such efforts. ERIC also cautions the Department against readability requirements that are too restrictive or difficult to administer, for reasons stated above and in my November 22, 2019 letter.

13. How can the Department best assess the views of plan participants themselves on the frequency, content, design, delivery, and other aspects of ERISA disclosures? Although commenters who represent plan participants are well positioned to evaluate participants' understanding of, and opinions on, ERISA disclosures, would the Department be better served by supplementing these commenters' point of view with feedback from individuals directly? If so, what would be an effective approach (e.g., surveys, focus groups), factoring in the resources necessary to administer such an approach? What, precisely, do commenters believe the Department should measure, and how? Specific suggestions, including sample outreach materials if relevant, are requested.

See previous discussion, including the responses to Questions 1, 2, 11 and 12.

14. Do the timing requirements for various ERISA disclosures increase or decrease the likelihood that participants will pay attention to them? Should the Department

¹⁰ *Id.* at 34-35.

consider changing when information is disclosed to participants and, if so, how? Explain how such changes would enhance the likelihood that participants would pay attention to the disclosure or disclosures or otherwise improve the disclosure experience.

As explained above, including in response to Question 10, ERIC is concerned about overly frequent disclosures causing participant overload. ERIC suspects that this may occur more frequently when many disclosures are issued at the same time, such as at the end of the year (QDIA, safe-harbor notice etc.). In ERIC's experience, overly frequent communications result in participants becoming less likely to consider, engage in or maximize their employee benefits. This result is very concerning to ERIC's member companies, and for that reason, ERIC strongly encourages the Department to evaluate and refine (or remove) disclosures that are repetitive or sent too frequently.

ERIC identifies specific documents of concern (and the reason for concern and its recommended action) in its response to Question 3.

15. Discuss the role of education in assisting participants and beneficiaries with the often technical and complex subject matter of ERISA disclosures, including investing generally. Should the Department take additional steps or provide further guidance with respect to participant education and, if so, what steps? How would this improve participants' receipt, understanding, or use of information required to be disclosed? What could or should the Department do to increase engagement on the part of ERISA plan participants?

The Department's existing guidance on the difference between education and (fiduciary) advice is very helpful, particularly Interpretive Bulletin 96-1. However, it makes sense for the Department to enhance that guidance by including in its discussion of education the types of information and tools being provided by employers as part of "financial wellness" programs, in order to encourage other employers to provide such programs.

16. Well-designed plan websites or internet-connected apps may benefit plan participants by effectively communicating plan information, including by adopting features not possible with paper, such as interactive videos, calculators, and layered design. What common features have plan administrators adopted in their websites or apps that are effective in communicating plan information to participants and attracting participants to engage in activity with their plan accounts online? What are the benefits of these features, and how do they achieve them? Should any such features be required by regulation?

As discussed in my November 22, 2019 letter, ERIC is aware that certain of its members utilize features that help convey information electronically, including through "apps" and hyperlinks, in plan communications.

While ERIC supports flexible rules that allow for these types of technology uses (as described in my November 22, 2019 letter), ERIC member companies do not support specific mandates regarding websites or "apps" because of the diversity of the populations of participants covered

by their plans and evolving technology. Rather, and as stated above (and discussed at length in the November 22, 2019 letter), guidance should be principles-based and should allow flexibility to accommodate future technology developments and potential research on what works best for certain participant populations.

17. As discussed in the regulatory impact analysis (RIA), well-designed plan websites and apps may also be used to provide effective communication of plan information to certain vulnerable populations, such as the visually impaired and non-native English speakers, by adding voice-reader and translation features. How do plan websites and apps currently use these features and how effective are they in enhancing the presentation and use of covered documents by participants with special needs?

ERIC is supportive of tools that can help facilitate communications to certain vulnerable populations, such as the visually impaired and non-native English speakers. ERIC is not averse to the Department engaging in such studies or testing to identify the best way to help communicate with such populations without imposing unreasonable costs or administrative burdens.

Again, ERIC cautions the Department from imposing such testing responsibilities on plans that lack the resources for such efforts. ERIC also cautions the Department against access requirements that are too restrictive or difficult to administer or do not allow for technology evolution. Finally, ERIC encourages the Department to ensure any requirements are consistent with other applicable laws, such as requirements under the Americans with Disabilities Act (which may impose certain requirements regarding website access).

18. Some plan sponsors and participants have expressed concerns about cybersecurity and privacy when participants access sensitive plan information and engage in financial activity online. To protect against these concerns, how do plan administrators currently assess risks and provide secure online access to their participants? What safeguards are implemented to protect participants, how effective are they, and what improvements could be made to make current systems more secure? What cost considerations are raised by increasing cyber security and privacy protections? Should risk assessments and security measures be required by regulation?

ERIC member companies are very well focused on cybersecurity and privacy concerns. One significant way that ERIC member companies address these concerns is by ensuring appropriate third-party service providers (such as recordkeepers and third-party administrators) agree by contract to have appropriate and updated data security and privacy protections in place. ERIC member companies also often incorporate internal protections into plan administration that are an extension of the plan sponsor's (business or organization) data security and privacy protections.

However, while ERIC member companies work very hard to address these concerns and to protect participant data and private information, ERIC cautions the Department from imposing regulations regarding such duties that are outside of ERISA's fiduciary duties under Section 404.

In accordance with those fiduciary standards, any (formal or informal) guidance by the Department in this area should reflect the fact-specific nature of Section 404, as the challenges of cybersecurity and privacy are very fact-specific and unique to each plan. Also, the Department should take care to make sure any standards applicable to ERISA plans do not conflict with existing legal requirements in this area (set by state law and other federal regulators) and are flexible enough to be able to evolve with technology and resulting changes to industry data and privacy standards and best practices.

19. Some literature suggests that participants find that different documents are presented more effectively in different mediums. For example, some participants prefer to receive certain covered documents on paper while other types of covered documents are preferred to be received electronically. What, if any, types of covered disclosures do plans and participants perceive to be more effectively communicated in print (e.g. highly individualized and complex notices), and what explains this preference? How might modern technology and effective website or app design make electronic presentation of these covered disclosures more effective and increase participant engagement?

On this question, ERIC's observation is that when participants favor paper it is usually because a document is longer, such as a Summary Plan Description. Beyond that, ERIC member companies find that the desire for paper is idiosyncratic and driven by the particular individual or his or her particular circumstances, such as the participant's preference for large print or the participant's life circumstance, such as nearing retirement.

ERIC expects there may be studies or testing to confirm the above observations or provide answers to the Department's questions. But rather than focusing on such studies or testing, ERIC encourages the Department to focus on finalizing the Default Electronic Disclosure Rule as quickly as possible, and to do so in the manner described in my November 22, 2019 letter. For all of the reasons stated in my letter, paper communication is becoming increasingly obsolete and the Department's resources should be focused on improving electronic communication. In other words, the Department should shift its focus on an electronic disclosure framework as the default and improving that framework rather than dissecting the increasingly obsolete paper framework. Of course, ERIC recognizes that some participants continue to prefer paper, or prefer it for specific disclosures or circumstances. The Default Electronic Disclosure Rule ensures that those participants have continued access to paper upon request.

20. In the RIA for this proposal, the Department estimates that plans will benefit from substantial cost savings by distributing more covered documents electronically. How and to what extent do plans share these cost savings with plan participants?

In the experience of ERIC's members (and as explained in my November 22, 2019 letter), cost savings are often passed onto participants either directly (for example, through direct reductions in costs charged to the plan or in additional employer contributions) or indirectly by freeing up other resources (financial and other) for the plan's benefit. This is also cited by other studies (in addition to those cited in the November 22, 2019 letter). For example, a recent study found that reducing plan administration costs, including through electronic

disclosure, “translates to lower expenses – and higher net investment returns – to the participant.”¹¹

21. Are there steps the Department could take to better coordinate disclosures required under ERISA and notices required under the Code?

ERIC encourages the Department to work closely with the IRS, as well as other agencies including the PBGC and, where relevant, the Securities and Exchange Commission. Such coordination could help ensure that guidance regarding best practices for participant disclosure is comprehensive, consistent and effective in enhancing participant understanding of their benefits without creating undue burdens and costs for employers and plan administrators. A good example of why this coordination is needed is the 8955-SSA filed with the IRS. In its 2013 report, the GAO described the challenges that are created from the 8955-SSA, namely that the reporting results in terminated participants that have already received a benefit payment receiving an out-of-date or inaccurate notice of potential benefits from the Social Security Administration.¹² This can lead to participant confusion and frustration as well as significant work for the plan administrator. This is a great example of the coordination that is needed among the federal agencies to improve the effectiveness of disclosures for their intended purpose, which is to help participants access and understand their employee benefits.

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ERIC appreciates the opportunity to provide feedback on the Department’s inquires. As mentioned above, ERIC anticipates that finalization of the Default Electronic Disclosure Rule will provide further insight on the questions presented in the RFI and, therefore, we look forward to continued conversations on the issues presented. If you have questions concerning our comments on the Default Electronic Disclosure Rule or the RFI, or if we can be of further assistance, please contact us at (202) 789–1400.

Sincerely,



Aliya Robinson
Senior Vice President, Retirement and Compensation Policy

¹¹ Default Electronic Deliver Works: Evidence of Improved Participant Outcomes from Electronic Delivery of Retirement Plan Documents, HXH, Quantria Strategies, Prepared for the Spark Institute, November 2019, p. 21-22.

¹² GAO–14–92, Private Pensions: Clarity of Required Reports and Disclosures Could Be Improved, p. 20, GAO (Nov. 2013), p. 21-26.