

November 22, 2019

The Hon. Preston Rutledge
Assistant Secretary for Employee Benefits
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW, Ste S-2524
Washington DC 20210

**Re: Request for Information Relating to ERISA's General Disclosure Framework
RIN 1210-AB90**

Dear Assistant Secretary Rutledge:

The American Retirement Association (ARA) appreciates this opportunity to provide responses to the Department of Labor's (DOL's) Request for Information (RFI) on the general disclosure framework under the Employee Retirement Income Security Act of 1974 (ERISA), focusing on design, delivery, and content. This is an important issue for the ARA and its members and we look forward to working with the DOL. We are separately submitting comments today on the proposed new safe harbor regulation for the use of electronic media by employee benefit plans to disclose required information to participants and beneficiaries.

The American Retirement Association (ARA) is a national organization of more than 26,000 members who provide a wide variety of services to American employers and sponsors of retirement plans, including investment advice, retirement plan consulting and administrative services. ARA members are a diverse group of plan sponsors and retirement plan professionals of all disciplines, including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is comprised of five premier retirement industry associations; the American Society of Pension Professionals & Actuaries (ASPPA), the ASPPA College of Pension Actuaries (ACOPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), and the Plan Sponsor Council of America (PSCA).

Introduction

The ARA and its underlying affiliate organizations support the principle that informs the RFI: to improve the effectiveness of retirement plan disclosures, especially with respect to design and content. We have long been supportive of the DOL's initiatives concerning improving the ERISA disclosures, in particular, through electronic delivery. The ARA previously recommended to the DOL that electronic disclosure be the default method of communication with ERISA plan participants and beneficiaries. The ARA's hope is that a wider use of electronic disclosure will be facilitated through this RFI and the proposed new safe harbor. We also believe that they are consistent with President's August 2018, Executive Order¹ instructing DOL to review whether agency actions could improve the effectiveness of disclosures and reduce their cost to employers, which in effect promotes retirement security by expanding access to workplace retirement plans, a principal focus of the ARA, along with reduced costs to plans and

¹ Executive Order on Strengthening Retirement Security in America, No. 13847 (Aug. 31, 2018).

participants. The Executive Order also emphasizes that reducing the number and complexity of ERISA notices and disclosures currently required would ease regulatory burdens.

The questions posed in the RFI are squarely within the expertise and experience of ARA's members and we believe that we can provide meaningful assistance to the DOL. At the outset, we wish to emphasize that that additional time for developing responses to these questions would be very beneficial.

Responses

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.

The ARA's members have found participants often do not understand much of the terminology used in the ERISA disclosures furnished to them. Extensive research by one of the ARA's members surveying 1,000 respondents generally showed that participants want communications that are more concise, brief, direct and efficient, simpler and easier to understand, informative and educational, relatable, participant-centered and personalized, as well as engaging.² However, participant engagement is not within the employer's control and requires substantially different actions outside the scope of what ERISA requires. ERISA requires the furnishing of effective disclosures; it does not require that participants read and understand them.

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?

Surveys of participants and focus groups can be helpful in assessing the use of disclosures, their effectiveness, and their impact. ARA does not believe, however, that plan administrators should bear responsibility for making these assessments. Accordingly, we do not support the imposition of additional requirements to require plan officials to affirmatively assess use, effectiveness, impact of disclosures. This would unduly burden plan sponsors and act as a barrier to plan adoption.

3. Please identify any currently mandated routine retirement plan disclosures for which effectiveness and efficiency could be improved and set forth recommendations for improvement. Please explain why the particular disclosure needs improvement.

The ARA believes that safe harbor notices are too complex to be effective and do not focus on the desired action sought from the participant—namely engagement and participation. The QNEC notice does not encourage the participant to make a deferral because the deferral does not

² See "Boosting the Effectiveness of Retirement Plan Communications" (Jan. 2019), available at <https://docs.empower-retirement.com/Empower/institute/Effective-Communication.pdf>

result in an additional employer deposit. In fact, some of our members believe that the QNEC notice may discourage or reduce deferrals because of the misunderstanding that the employer is saving for the employee. For example, a participant who wants to save 3% of pay, as a deferral, might decide to defer nothing since they may view the QNEC as the employer is making a 3% contribution for them. In general, ARA believes that required content should be more limited. Further, for matching formulas, a short notice regarding the safe harbor match would be far more effective. The following example includes language which we believe would be more effective than the notice currently required:

You have the right to participate in the company's 401(k) plan. You may contribute a portion of your pay to the plan. These salary deferrals that you make, up to 4% of your eligible compensation each pay period, will be matched dollar for dollar by your employer. For example, if you earn \$2,000 in a pay period and defer \$80, which is 4% of your pay, your employer will deposit an additional \$80 for you. You can make a deferral election by _____. Additional details about the plan are located _____. If you need assistance completing this form or have any other questions, please contact _____.

We also believe that Summary Annual Reports (SARs) are not especially useful because they do not provide information that most participants consider meaningful. We understand that SARs are required by ERISA and therefore, we are not suggesting their elimination. However, to reduce the burden on plan sponsors, we suggest that employers be permitted to combine the SAR with other year-end disclosures to participants. Additionally, we suggest eliminating the OMB paperwork reduction disclosure. Participants describe this disclosure language as confusing.

The ARA does not have comments regarding the content of the Summary Plan Description (SPD) but insofar as retirees are concerned, we believe that delivery requirements are extremely burdensome and do not add value for participants. We recommend giving employers a "fresh start" opportunity with respect to terminated participants, permitting fewer expensive mailings, and/or permitting notice of online access. Additionally, QPSA notices under defined benefit plans are extensive for plans that offer special death benefits. We believe that these notices overwhelm participants, many of whom fail to make an election. Instead, a notice simply stating the following would be more effective:

You have the ability to elect a non-spouse beneficiary for some or all of your plan benefits. Your SPD describes the death benefits under your plan. If you would like to designate a non-spouse beneficiary, [[follow these steps](#)]. If you need assistance completing this form or have any other questions, please contact [_____].

Because the statute requires QPSA notices to include content similar to QJSA notices, a statutory change may be required to effectuate this simplification.

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

The ARA understands that participants want more personalized communications from their retirement plans. The experiences of many ARA members show that when electronic communication campaigns are targeted to personal audiences (for example people nearing retirement, or people with low deferral rates) participants tend to engage at greater rates. However, we do not support making additional customization obligatory.

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?

We believe that competition in the marketplace of plan service providers provide incentive for improved communication and results. Alternate organization of information does not lend itself to regulation.

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.

Although additional time for responding to this question would be welcome, we can initially identify Safe Harbor Notices, Annual Participant Fee Disclosures, and QPSA Notices for Beneficiary Designations as too voluminous, complex, or both.

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.

The experience of ARA’s members is that drawing people in with a clear and engaging message (not necessarily with a summary of key information, but perhaps a statement regarding why the information is important) and allowing them to follow links to get more detail is more effective than delivering complex documents.

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?

Our view is that SARs are obsolete now that employers are required to post it on an intranet and the Form 5500 is also readily available at the DOL’s website, as well as many other websites. If delivery requirements cannot be eliminated, we suggest eliminating the OMB paperwork reduction disclosure. Participants describe the language as confusing. In addition, we think that revocation of beneficiary designations (and accompanying QPSA disclosure timing) required at age 35 with defined benefit plans is outmoded.

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

Required summaries of participants’ rights and obligations under the plan are duplicative and result in lengthy disclosures, thereby reducing their efficacy. In addition, safe harbor notices and annual participant fee disclosures are duplicative when fee information is otherwise readily available. Further, SPDs can be redundant to annual notices such as safe harbor notices and

automatic enrollment notices. Additionally, there is some redundancy between IRS and DOL requirements.

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?

The ARA believes that plan sponsors currently must provide too much information to participants. Shorter, more focused notices would be more effective. The ARA supports condensing and streamlining required disclosures or permitting the furnishing of online/internet links to required information.

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.)?

Some design elements, including those described in this Question 11, increase the likelihood participants will read and understand disclosures. The ARA does not believe that the DOL should regulate a “one size fits all” approach for all plans because varying participant populations necessitate varied design elements. Additionally, the market drives innovation in this area. Clear, qualitative standards for plan fiduciaries who use innovative methods for communicating essential information to participants would be more beneficial than regulatory requirements for design elements.

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?

The ARA does not think that the language of the DOL’s general standard is problematic. However, we do believe that most disclosures provided today, including documents safe harbor notices drafted by the DOL or by IRS/Treasury, do not meet this standard. Rather, in practice, plan fiduciaries are reluctant to prioritize comprehensibility of the notices over their technical accuracy due to concerns relating to liability.

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.

In ARA's experience, surveying participants or conducting focus groups of participants is often useful for assessing participants' views. We conducted a short survey and have included results in this response as well as our comment letter on the proposed rule. We are able to tap into our membership for a broader survey.

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

For recurring notices—we believe that fewer is better. Participants get “notice fatigue” and engagement wanes (particularly when they get notices with no actionable information, like the SAR). The consolidated disclosure proposed by DOL under the proposed new safe harbor for electronic disclosures would be a strong step towards improve participants' disclosure experiences. We support packaging required information into fewer disclosures – particularly an annual disclosure highlighting actions required of participants. We believe that coordination with the Treasury Department and IRS as to IRS-required disclosures would be key to accomplishing this most effectively.

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?

As DOL is aware, insufficient understanding of financial concepts – retirement savings in particular – by ERISA plan participants is a serious problem. Concerns regarding financial literacy have been amplified because participants have significant responsibility for ensuring the adequacy of their retirement income with the dominance of participant-directed individual account plans. Many participants may not have a sufficient understanding of investment principles and strategies to make their own informed investment decisions. ARA believes that providing education to participants about financial health and retirement savings in particular, supports the policy goal of enhanced retirement security by help participants assess their needs and evaluate their options for the future. Plan sponsors rely heavily on their service providers for a wide array of support related to retirement plans, including providing participant retirement savings education. Educational programs for participants provided by their plans' service providers are a natural fit as participants are already engaged with the provider. We believe that DOL should issue guidance clarifying that plan assets may be used to pay for some participant retirement education. Participant engagement would increase because many participants and plan sponsors favor leveraging existing relationships for information including retirement readiness programming for participants.

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?

Key features include personalizing information (like a retirement readiness score), being able to input personal data (changing assumptions, adding other assets or health info, etc.), being able to see the effect of behavior changes (increasing deferrals, retiring later, etc.) and take immediate action, and receiving targeted messages. The ARA does not believe that any such features should be required by DOL, however.

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?

Additional time would be needed to respond to this question.

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?

It is well-established that ERISA fiduciaries are dutybound to take prudent steps to protect plans and participants from cyber risks and to protect their privacy. ARA does not believe that specific safeguards should be required by the DOL in this regard. Cyber risks and security change too rapidly to make specific regulation a workable solution. Further, required cybersecurity measures that are known in the public space can reduce the effectiveness of these controls because bad actors become familiar with what to expect. If DOL is committed to regulating in this area, we suggest a standard-based approach, which is conducive to security precautions that can be updated over time to account for new risks.

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?

We believe that modern technology such as an effective website and app design can pair the notice with opportunities for participants to take immediate action; some participants appreciate this functionality. They appreciate the flexibility and convenience offered, including the ability to interact with their accounts anytime, anywhere. For example, being able to change deferrals or investments after receiving information electronically are popular. Many participants have become accustomed to receiving documents and disclosures electronically (e.g. mortgages, real

estate purchases, lending), they seem to be comfortable taking advantage of available features of complementary technology and determining on their own whether there are documents (whether an entire document or a portion of a document) they desire to be printed. Moreover, participants appreciate having immediate and continuous access to their information provided by technology as well as the greater efficiency for filing and storing that information.

One of the ARA's affiliate organizations recently took these questions to its members. Over a ten-day period (November 10–November 20, 2019), the PSCA, part of the ARA, conducted a “flash poll” of its plan sponsor members to get a sense of their perspective regarding the Proposal. While the sampling was limited, we received responses from 56 plan sponsors, representing a variety of plan and participant demographics; approximately a third (35%) had \$50 million in plan assets or less, 21% had between \$250 million and a billion in assets, and a third (32%) represented plans with more than \$1 billion in assets. Nearly all (97%) of responding employers felt that providing participants (with a valid email address) with an initial paper disclosure that states they agree to receive some or all future disclosures via electronic format was sufficient to protect the ability of participants to receive paper disclosures. With regard to a website where participants could access required documents, the majority of plan sponsors already had that type medium available, either in-house (70%) or via their provider (62.5%) – and many had both. This was more common among larger plans than smaller employers, however. A majority of survey respondents (72.5%) expressed a preference for a single delivery method for all notices, 17.5% favored allowing the participant to choose, as written in the proposed rule, and the remaining 10% preferred to retain the ability to determine a delivery medium for individual notices.

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?

These cost savings may be shared either directly (i.e. by reduced plan costs) or indirectly (i.e. by investing in participant websites or other plan services). In the experience of ARA members, most large plans and many small plans pay for disclosures out of plan assets. We believe that reduced disclosure costs will result in lower fees charged to plan accounts.

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

The ARA believes that the ability to use the “notice and access” approach for all required disclosures would simplify the process greatly and make it more useful and understandable to participants. Any efforts the DOL can take toward attaining that result would be greatly appreciated.

Conclusion

The ARA very much appreciates the DOL's commitment to reducing the costs and burdens imposed by ERISA's disclosure requirements as well as to making retirement them more understandable for participants and beneficiaries. We wish to thank this Department for the opportunity to provide input through the RFI. ARA looks forward to working with the DOL on this initiative and would welcome the opportunity to discuss these comments with you further. Please contact Will Hansen, Chief Government Affairs Officer, at (703) 516-9300 or at WHansen@usaretirement.org if you have any questions. Thank you for your time and consideration.

Sincerely,

/s/ Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/ Will Hansen, Esq.
Chief Government Affairs Officer
American Retirement Association

/s/ Allison Wielobob, Esq.
General Counsel
American Retirement Association