ERIC | THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Submitted Electronically

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Request for Information – SECURE 2.0 Section 319 –Effectiveness of Reporting and Disclosure Requirements, RIN 1212-AC09

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to submit comments on the "Request for Information – SECURE 2.0 Section 319 – Effectiveness of Reporting and Disclosure," (RFI) released by the Employee Benefits Security Administration at the Department of Labor (DOL), the Internal Revenue Service (IRS) at the Department of the Treasury, and the Pension Benefit Guaranty Corporation (PBGC) (collectively, the Agencies), and published in the Federal Register on January 23, 2024.[1] As discussed below, ERIC urges the Agencies to formulate recommendations required by the SECURE 2.0 Act carefully, without imposing unnecessary or unactionable new requirements, and to thoughtfully consider costs and administrative burdens.

By way of background, ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to millions of employees and their families, located in every state, city, and Congressional district.

ERIC member companies sponsor retirement plans, including both defined benefit and defined contribution plans, that are governed by the *Employee Retirement Income Security Act of 1974*, as amended (ERISA). Millions of workers and retirees participate in these plans. ERIC's

[1] 89 Fed. Reg. 4215.

member companies spend considerable amounts of time, money, and effort to educate their workers about retirement adequacy, holistic financial wellbeing, and their retirement benefits. Part of these efforts includes complying with myriad reporting and disclosure requirements under both ERISA and the Internal Revenue Code (Tax Code).

Section 319 of SECURE 2.0 requires the Secretaries of Labor and the Treasury and the Director of the Pension Benefit Guaranty Corporation to review the reporting and disclosure requirements under the Tax Code and ERISA.[2] No later than 3 years after the date of enactment, those agencies (after consulting with a "*balanced group of participant and employer representatives*") are required to report on the effectiveness of applicable reporting and disclosure requirements and make recommendations to the congressional committees of jurisdiction. Those recommendations are directed to "*consolidate, simplify, standardize, and improve*" these requirements. The goal of this directive, under the statute, is to "*simplify*" the requirements to "*ensure that plans can furnish and participants and beneficiaries timely receive and better understand the information they need to monitor their plans, plan for retirement, and obtain the benefits they have earned.*"[3] The report is mandated to include "*an analysis of how participants and beneficiaries are providing preferred contact information, the methods by which plan sponsors and plans are furnishing disclosures, and the rate at which participants and beneficiaries are receiving, accessing, understanding, and retaining disclosures*."[4]

ERIC strongly supported Section 319 because it provides an opportunity for the Agencies (in close consultation with stakeholder groups) to conceptualize a coherent regime for the notice and disclosure requirements. Many of these provisions have been added on an ad hoc basis during the 50 years since ERISA was enacted. Some contain duplicative information or data that cannot be acted upon by participants, beneficiaries, or government agencies.

In this RFI, the Agencies have asked dozens of open-ended questions that have sparked conversation and interest among ERIC's member companies. The information and views contained in this letter should be viewed as the continuation of the conversation ERIC has had with the Agencies about these and other provisions. Below, we address many of the questions and lay out principles that should inform the Agencies' approach in formulating this report and recommendations. However, we encourage the Agencies to consider this a "first step" in this process. The Agencies should take other steps, such as asking a broad set of stakeholders more specific questions, conducting participant focus groups, and public hearings.[5] We would very much look forward to participating in that process.

[2] Section 319(a).
[3] Section 319(b)(1).
[4] Section 319(b)(2).
[5] *See* Question 23 of the RFI.

The Purposes of Participant Disclosure

To accomplish the goals of Section 319, there must be a unifying set of principles about the purposes of disclosure. In ERIC's view, the broad purpose of retirement plan disclosure is to provide participants and beneficiaries with understandable, actionable information in an efficient manner. More information is not always better. Instead:

- the information conveyed in mandatory disclosures should be *simple enough* that an average plan participant without technical expertise can understand it;
- the purpose is to make information *available* should the participant desire to engage;
- a participant should be able to *do something* with the information: for example, contact a plan administrator, modify an investment selection, or claim benefits using information provided; and,
- the tangible benefits to participants of each piece of information disclosed should outweigh the costs of gathering, digesting, and disseminating the information.

With these principles in mind, we offer the following perspectives.

- **Disclosure Changes Should Focus on Simplification and Actionability**

Even prior to enactment of SECURE 2.0, DOL had made clear that the content and design of participant disclosures generally has been a priority. ERIC member companies are, of course, committed to providing participants with useful information while complying with their legal obligations to provide required disclosures. In that regard, they have learned that participants value simplicity and clarity in disclosures. The seemingly haphazard current conglomeration of disclosure requirements has been called "overwhelming."[6] Indeed, "… participants tend to ignore many notices and disclosures due to the frequency and volume."[7]

That is why, as a preliminary matter, ERIC is skeptical of adding additional content to these disclosures, which could serve to confuse participants further, make the disclosures more complex, and increase administrative burdens and costs. To the contrary, legislative recommendations should instead simplify and consolidate. In 2017, DOL's ERISA Advisory Council catalogued a number of recommendations for simplifying and streamlining the disclosure requirements which deserve consideration. For example, mandatory delivery of the Summary Annual Report could easily be eliminated. This report, which summarizes information

[6] Advisory Council on Employee Welfare and Pension Benefit Plans, Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors at 11, *available at* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans.pdf (Nov. 2017).
[7] *Id.* at 30.

available in a plan's Form 5500 filing, lacks broad value to most participants.[8] Similarly, Summary Plan Descriptions have become ever more detailed and complex, and should be streamlined. Requirements for updated Safe Harbor Notices for mid-year changes should be relaxed to permit notice to be satisfied some reasonable amount of time before the change takes effect.

An excellent example of the need for simplification is the Annual Funding Notice for defined benefit plan participants, which includes an enormous amount of detailed information about plan funding, actuarial and accounting concepts, plan investment policies, and PBGC insurance coverage. A plan participant is unable to take action (certainly not immediate action) on much of this information.

This "actionability" is critical to assessing the potential costs and benefits of disclosure requirements, but it is not the only factor. We note that several of the questions in the RFI ask broad questions about disclosure design elements, measurements of participant engagement, language requirements, and retention.[9] We urge the Agencies to resist attempting to create a disclosure regime that neglects to place an analysis of costs and administrative burdens at the forefront.

Recently, the DOL has proposed a series of requirements that fail this test. The DOL has proposed imposing costly requirements on plans choosing to engage an auto-portability provider to assist employees in keeping money in the retirement system.[10] Under the relevant statutory provision, there are to be extensive disclosures to retirement savers both before and after an automatic portability transaction.[11] These disclosures must be "*written in a manner calculated to be understood by the average person and shall not include inaccurate or misleading statements*."[12] Unfortunately, the DOL has gone several steps further. For example, the proposal to implement this provision would require an auto-portability provider to make non-English language copies of required notices available, and to offer non-English language call center support, if the provider sends a notice to a terminated participant residing in a county where 10 percent or more of the population is literate only in the particular non-English language.[13] This is not mandated by the statute and would simply serve to increase the administrative costs of sponsoring a retirement benefit, to the detriment of participants.

We urge any recommendations made by the Agencies to fully consider the costs, benefits, and unintended consequences of imposing new requirements.

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[8] Notably, the Form 5500 filings are available electronically, and can be accessed by participants at their convenience.
[9] RFI questions 4-8.
[10] *See* 89 Fed. Reg. 5624 (Jan. 29, 2024).
[11] Internal Revenue Code sec. 4975(f)(12)(B)(v) and (vi).
[12] Internal Revenue Code sec. 4975(f)(12)(B)(vii).
[13] Proposed 29 C.F.R. sec. 2550.4975f-12(b)(5)(vi)(B).

- **The Agencies Should Recommend Fully Authorizing Universal Default Electronic Delivery**

One of the most controversial provisions of SECURE 2.0 was Section 338, which made it harder for plans to use default electronic delivery of certain disclosures required by ERISA. Under the law, beginning in plan years that begin after December 31, 2025, a plan generally may furnish an individual account plan's annual pension benefit statement either (a) in accordance with the strictures of the 2002 electronic delivery safe harbor,[14] or (b) by paper delivery, unless the participant requests electronic delivery and the plan permits it. Defined benefit plan participants are subject to the same rule, except only every three years. The law requires updates to the Department's 2020 safe harbor, which liberalized default electronic delivery with ample opportunity for opt-out and other guardrails.[15]

In the context of simplifying disclosures, making them more cost-effective, and providing participants with actionable information, encouraging more electronic delivery is an obvious step. Not even four years ago, the Department of Labor found that its rule liberalizing the use of electronic delivery was projected to save nearly $350 million per year in costs.[16] We submit that with the ubiquity of electronic statement delivery in nearly every facet of life, the agencies should recommend rules fully realizing the benefits of the 2020 safe harbor.

- **Plans Should Not Be Required to Track Engagement with Electronically-Delivered Documents**

The RFI asks a number of questions about whether plans and recordkeepers track engagement with disclosures. Anecdotally we understand that plans may not track open-rates for electronically-delivered disclosures. In our view, it would be inappropriate to condition the use of electronic delivery on "access in fact" or other engagement-tracking. The applicable disclosure requirements should not impose burdens on plans if participants choose not to engage with the electronic disclosures provided pursuant to regulations. In the more than two decades since the 2002 Safe Harbor, Congress has not imposed a requirement that plan administrators monitor who actually accesses and downloads electronic disclosures. Furthermore, it would be inequitable to impose "access in fact" burdens for electronic disclosures, when an analogous requirement has never been imposed on paper disclosures, which may be less accessible, more likely to be immediately physically discarded, and potentially less physically secure.

[14] 29 CFR 2520.104b–1(c).
[15] Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 85 Fed. Reg. 31884 (May 27, 2020).
[16] *Id.* at 31888.

- **Reporting to the Agencies Should Be Tailored**

The same basic premises that apply to participant disclosures should also apply to reports that are required to be filed with the Agencies: that is, the reports themselves should not be burdensome to produce, the agency must be empowered by statute to take some action with the information it receives, and the potential benefits should outweigh the costs.

In this regard, we are concerned that the Agencies appear to be exploring whether they have the authority – or should – collect information that "data users other than the Agencies… would find useful."[17] That is because "usefulness" is not the standard for information collection. According to DOL, the purpose of mandatory reporting is to "to assure that employee benefit plans are operated and managed in accordance with certain prescribed standards and that participants and beneficiaries, as well as regulators, are provided or have access to sufficient information to protect the rights and benefits of participants and beneficiaries under employee benefit plans."[18] Plans generally do not object to many reports, such as the Form 5500, being publicly available and used to formulate data sets and research as an ancillary feature. However, the Agencies would overstep in devising reporting requirements *for the purpose* of providing researchers with "useful" information. Instead, these requirements should be tied to actions that the agencies can actually take to enforce applicable laws and regulations.

The Agencies also ask whether the system would benefit from increased coordination between the Agencies regarding the reporting requirements. The answer is absolutely. In an ideal world, the disclosure and reporting regimes would be perfectly coordinated by the Agencies. For example, the Department of Labor and the IRS should establish one unified standard for electronic delivery.

There are real world consequences when the Agencies do not coordinate or share data.[19] For example, in establishing the Retirement Savings Lost and Found created by Section 303 of SECURE 2.0, the Department of Labor "had planned to use data that plan administrators submitted to the Internal Revenue Service" on Form 8955-SSA, but IRS "has now indicated that it will not authorize the release of this data to the Department for the purpose of communicating either directly with participants and beneficiaries about retirement plans that still owe them retirement benefits or indirectly through the Retirement Savings Lost and Found online searchable database."[20] The result is a Proposed Information Collection Request "asking" for a variety of information not required by the statute, some of which is already disclosed in a

[17] Question 21 of the RFI.
[18] Department of Labor, "Form 5500 Series," *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500#:~:text=The%20Form%205500%20Series%20is%20part%20of%20ERISA's%20overall%20reporting,or%20have%20access%20to%20sufficient. This site describes Form 5500 as a tool and source of information for others as well.
[19] Question 22 of the RFI.
[20] "Proposed Information Collection Request Submitted for Public Comment; Retirement Savings Lost and Found," 89 Fed. Reg. 26932, 26933 (Apr. 16, 2024).

different format, and some of which may not be maintained in the format DOL may eventually request.[21] This hurts plan participants, who ultimately bear the costs of this inefficiency.

Conclusion

We look forward to working closely with the Agencies as they embark on a process to formulate recommendations to bring coherency and efficiency to the reporting and disclosure rules. Please do not hesitate to contact us if we can be helpful.

Sincerely,

Andy Banducci

[21] ERIC will submit comments on this Proposed Information Collection Request under separate cover.