

January 9, 2020

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: RIN 1210-AB90
Request for Information on Effectiveness of ERISA Disclosures

The Pension Rights Center appreciates this opportunity to comment on the effectiveness of ERISA disclosures. The Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers, retirees and their families.

The Pension Rights Center submitted comments on November 22, 2019 on the proposed rule on Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA (RIN 1210-AB90).¹ The following comments are directed to the Request for Information (RFI) included at the end of the proposed rule.

INTRODUCTION

Each year thousands of plan participants and their beneficiaries seek advice and assistance from the Center and the six government-funded regional pension counseling projects we work with around the country on the terms of their retirement plans and the retirement benefits they have earned. In the process of assisting participants we view plan disclosures and see the confusion these disclosures sometimes cause to participants.

The Pension Rights Center has testified before the ERISA Advisory Council on numerous occasions on the effectiveness of ERISA disclosures. Most recently, the Center testified on “Mandated Disclosures for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors.”² In our comments we emphasized the critical importance to participants of summary plan descriptions and individual benefit statements. Summary plan descriptions (SPDs) provide the basic information participants need to understand their plans and benefit entitlements. Individual benefit statements tell participants the

¹Comments to the Department of Labor on proposed rule for default electronic disclosure.

http://www.pensionrights.org/sites/default/files/docs/prc_comments_on_proposed_e-disclosure_safe_harbor_rin_1210-ab90_11-22-2019_.pdf

² Statement of the Pension Rights Center on Mandated Disclosures for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors, before the ERISA Advisory Council, June 7, 2017.

http://www.pensionrights.org/sites/default/files/docs/speeches/prc_erisa_advisory_council_disclosure_statement_2017_final_updated.pdf

amount of benefits they have earned or will be entitled to as of a specific date. In the case of individually-directed 401(k) plans, benefit statements provide vital information on fees and investments.

RFI Questions

The Center's 2017 testimony before the ERISA Advisory Council covered several of the issues included in the RFI. However, we will direct our response to the RFI by question number.

* Question 3- Identify currently mandated retirement plan disclosures for which effectiveness and efficiency could be improved.

All mandated disclosures could be improved with a brief introductory statement that answers the following questions – what is this, why am I receiving it, what do I do with it, will this affect my current or future benefits and whom do I contact at the plan with a question? The Labor Department could require such a statement for all disclosures. Additionally, the Labor Department could assist employers and plan administrators by drafting model statements for specific required disclosures. Existing Labor Department model statements could be reviewed to eliminate complexity and technical language.

*Question 4 – Would more personalized disclosure enhance engagement?

Adding the introductory statement recommended in the answer to Question 3 could serve to make the disclosure more personal to participants.

Other means of personalized disclosure, such as directing certain investment choices only to specified individuals in a plan, run a fiduciary risk of not operating the plan in the interests of all participants. Similarly, marketing tactics directed at individuals may be inappropriate for ERISA employer-sponsored plans.

Question 5 – Are there ways through regulation or sub-regulatory guidance to require or facilitate plan administrators to organize information in disclosures to reflect life events?

Certainly, the Labor Department could recommend in guidance, for example, an appropriate grouping of information according to life events in the summary plan description.³ The 2017 ERISA Advisory Council Report on Mandated Disclosures states "(A)n SPD based on life events that correlates with stages of employment could tend to make an SPD easier for participants to use and provide relevant information at the point at which it is most needed."⁴ Since life events progress differently for different participants, the complete SPD should always be provided when required or requested.

Additionally, the Labor Department could help plan sponsors and administrators to navigate ERISA disclosures by grouping required disclosures on the EBSA website by life-events, such as joining the plan, annual notices, triggering events, leaving employment. The list of disclosures on the EBSA website could also include all IRS required disclosures for participants in ERISA plans. It would help employers and plan administrators to have all ERISA participant disclosures listed in one place. A brief one-sentence summary of the required disclosure could be included, not just the title of the disclosure.

³ See the Pension Rights Center Statement before the 2017 ERISA Advisory Council.

⁴ See 2017 ERISA Advisory Council report on mandated disclosures, page 15.

A “Summary/Quick Start Guide” for the SPD that is organized by life-events could also be helpful to participants, but it should not be a substitute for the complete SPD. (See our answer to Question 7.)

Question 6 - Identify ERISA documents that may be too voluminous or complex.

Generally, when persons speak of complex or voluminous ERISA documents, they have in mind the SPD. If a plan is complex and voluminous, then the SPD could be the same. Participants in such a plan need to know their rights and obligations under their plan in order to know how to earn and claim their benefits. A complex SPD often is a reflection of the complexity of the plan itself. Our suggestion above to organize the information in an SPD according to life events is one way to help participants navigate a complex document.

The Labor Department could suggest to employers and plan administrators who write the SPDs ways to simplify and clarify the information, or at least suggest sources that specialize in writing for the public. In our statement before the 2017 ERISA Advisory Council we suggested that EBSA write a fact sheet for the compliance section of the EBSA website addressing ways to organize and simplify SPDs. The Labor Department also could sponsor seminars on plain writing techniques.

Question 7 – Should the Labor Department suggest or require a summary substitute for the complete document described in Question 6 above?

While a brief and accurate summary of key information could be helpful to participants, it should not be a replacement for the complete SPD. Any required document, particularly the SPD, should be furnished in its entirety. The 2017 ERISA Advisory Council Report on Mandated Disclosures, while recommending a “Quick Start Guide” as part of the SPD for defined contribution plans, “would not eliminate the requirements to update the complete Summary Plan Description as legally required and to provide the complete SPD (1) upon initial eligibility and (2) upon request at any time.”⁵

Similarly, it is not sufficient to have the document available online where a participant must search to find it nor to require a participant to make a request for a document that should be furnished automatically.⁶

After the initial SPD, complete SPDs are only required to be furnished every five years if the plan has been amended and every ten years if the plan has not been amended. The Center believes the current required disclosure regime for SPDs is not overly burdensome. A new SPD every five to ten years will highlight changes to the plan since the last SPD. SPDs record changes in benefits and entitlements, providing crucial information to participants who must plan for retirement and make life decisions about jobs and opportunities as well as retirement security.

Question 8 – Does ERISA require disclosure of any information that has become obsolete?

In considering obsolete disclosures the Labor Department could be selective in declaring a disclosure obsolete. For example, the Summary Annual Report (SAR) which provides annual financial information for defined contribution plans could be duplicative for 401(k) plans that already furnish quarterly benefit statements to participants. However, the financial information in the SAR could be useful to participants in certain defined contribution plans, money purchase plans and ESOPs (employee stock

⁵ See page 9, ERISA Advisory Council Report on Mandated Disclosures

⁶ See the Pension Rights Center comments on the proposed “notice and access” disclosure rule.

ownership plans) who do not receive quarterly statements, and who seek to track the financial health of their plans. Thus, the SAR could be eliminated only in cases where it duplicates other disclosures.

Question 10 – Is it feasible to condense and streamline information into fewer disclosures?

In considering the number of required disclosures, it is important to differentiate between automatic disclosures provided on a regular basis, such as annually or quarterly, and disclosures provided only when triggering events occur, such as blackout notices and termination of employment notices. Notices should only be combined when they are similar in content and timing. For example, certain fee and investment disclosures can already be combined under Labor Department guidance.⁷ Similarly, the Labor Department regulation on Fiduciary Requirements for Disclosure in Participant-directed Individual Account Plans permits including individual plan-related fees actually charged in the quarterly benefit statement.⁸ There may be other disclosures with similar content and timing that could be combined. Additionally, the Labor Department could coordinate with the Internal Revenue Service to harmonize timing of similar disclosures. Although some disclosures may be combined, the purpose of each disclosure should remain clear and the required content should be disclosed in full.

Required disclosures should only be combined under Labor Department guidance. Service providers and plan sponsors should not be able to decide which disclosures to combine nor how to combine them.

Question 11 – Does disclosure design impact the chances that participants will read the disclosure?

Design probably does influence readability. However, the point of ERISA plan disclosures is to present all the required information in a form that can be retained for future reference. While certain design elements could further this goal, audio and video presentations are not easily preserved for future reference and should not be a substitute for “written in a manner to be understood by the average plan participant.”

Question 12 – Should the average plan participant remain the standard for readability?

Yes, although the Labor Department could provide additional guidance on the standard to assist employers and plan administrators in drafting disclosure documents.

Question 13 – How can the Labor Department assess the views of plan participants directly?

Certainly, surveys and focus groups could help the Labor Department assess the views of participants. However, the Labor Department needs to carefully select the groups so that they are representative of the whole. For example, an online survey would only represent the views of participants who have access to internet connected devices. This group could be younger and more urban than the whole.

⁷ EBSA Field Assistance Bulletin 2008-03, FAQs 8-10. <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2008-03.pdf>

⁸ Pension Rights Center summary: <http://www.pensionrights.org/issues/regulations/401k-fee-disclosure-plan-related-information> and 29 CFR 2550.404a-5(e)(2). <https://www.federalregister.gov/documents/2010/10/20/2010-25725/fiduciary-requirements-for-disclosure-in-participant-directed-individual-account-plans>

Question 14 – Do timing requirements increase or decrease the likelihood that participants will read them?

Timing is extremely important for disclosures. Disclosures that require action or choices must be timed to give sufficient advance notice of an opportunity but not so far in advance that the notice is laid aside and then forgotten. Notice should be given each time there is a required action or choice. For example, in our comments on the proposed rule, the Center objected to combining quarterly benefit statements with annual notices so that a participant would receive only one notice a year that benefit statements would be available quarterly. This defeats the purpose of the law.

Question 16 – Can website or internet-connected apps, such as interactive videos and layered designs, benefit participants?

As we noted in our answer to Question 11, the point of ERISA disclosures is to present all the required information in a form that can be preserved for future reference so that participants can later review the information provided and make decisions based on that information. Plan provisions, financial and investment information are all complex. While it may be important to improve the language and presentation of disclosures, practices that resemble marketing should not be a part of ERISA disclosures.

It is also well to remember that websites can be poorly organized and difficult to navigate. Adding additional steps to searches will discourage many “average plan participants” who do not spend a lot of time online or who do not have the personal or technical capabilities to navigate complex websites.

The 2019 report by VisibleThread, “Asset Management Website Clarity Index 2019,” states that “60 top asset management websites don’t meet basic readability requirements.”⁹ The Labor Department needs to have a cautious approach to disclosure issues to be sure that disclosures are accessible to all participants, not just to some participants who may have particular capabilities or special devices.

Beneficiaries-

The Labor Department should be mindful of beneficiary access when drafting guidance on ERISA plan disclosures. Beneficiaries have rights under ERISA to certain disclosures and to benefits. Disclosures to participants need to be made in a manner that can be shared with beneficiaries. Paper disclosures are the easiest way to share information with beneficiaries. On the other hand, if certain information is presented on a website a spousal beneficiary may need access to that website information. This could require a separate log-in or passcode. If website information is presented in a video, will a beneficiary have access to the video? Is there a way to preserve the information in that video for later viewing by a beneficiary? These are questions the Labor Department should consider when drafting guidance.

⁹ VisibleThread, <https://www.visiblethread.com/>

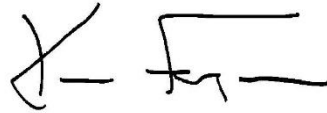
CONCLUSION

Participant disclosures can be improved in ways that do not harm participants and do not exclude a large number of participants or beneficiaries. We recommend that the Department of Labor give careful consideration of how best to streamline required disclosures for the benefit of all.

Respectfully submitted,



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