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STATEMENT OF THE PENSION RIGHTS CENTER ON PROMOTING RETIREMENT LITERACY AND SECURITY BY STREAMLINING DISCLOSURES TO PARTICIPANTS AND BENEFICIARIES BEFORE THE ERISA ADVISORY COUNCIL SEPTEMBER 15, 2009

Introduction

Good morning. I am Rebecca Davis, Staff Attorney for the Pension Rights Center. With me is Jane Smith, the Center's Policy Associate. The Pension Rights Center is the country's only consumer organization solely dedicated to protecting and promoting the retirement security of American workers and their families. For more than 33 years we have worked directly with pension plan participants who turn to us when they feel their retirement plan's disclosures have failed to properly and accurately inform them about their benefits. Thank you for inviting us to testify.

We applaud the ERISA Advisory Council for studying the efficacy of ERISA's reporting and disclosure scheme. ERISA's reporting and disclosure scheme is vital to ensuring that communication is always open between plans, participants and beneficiaries. Our recommendations today focus on the value of guidance provided by the Employee Benefits Security Administration of the U.S. Department of Labor and how improvements to such guidance can aid plan compliance and participants' understanding of their benefits. In particular we will suggest what EBSA could do to make disclosures more useful to participants while at the same time avoiding burdening plans with additional costs that are ultimately passed on to the participants.

ERISA's disclosure scheme/ content of disclosure

The importance of DOL model notices

Standard language and model notices can be a great help to employers and at the same time aid participant understanding of disclosures. The model notices that EBSA has written as part of its regulatory guidance have been helpful to participants, and we commend these efforts.

Model notices are important because notices generated by plans are often confusing to plan participants. Much of the confusion can be traced to the complex nature of retirement plans, and the fact that different people absorb information differently. We recommend that for each required participant notice or disclosure EBSA draft an introductory paragraph that would answer the following questions for participants.

1. What is it?
2. Why am I receiving it?
3. What do I do with it?
4. Will this affect my current or future benefits?
5. Whom do I contact at the plan and at EBSA with a question?

As a matter of cost, notices crafted to best communicate information to the target audience can ultimately reduce costs to plans, by preventing a flood of inquiries in response to confusing plan communications. Costs can be curbed by having model notices and use of the model notices could be required. We have heard anecdotal stories about law firms representing plans refusing to use the model forms so that they can bill a plan for time spent drafting an original notice. This may result in a more tailored notice for the plan, but it is far more costly than if the firm had simply begun with the model notice and made appropriate modifications. Furthermore, a truly informative and helpful notice will reduce administrative costs because participants who understand the notices are less likely to call the plan with follow-up questions.

We also want to encourage the DOL not only to write more model notices but to revisit notices already written to be sure they are delivering useful information for participants. Model notices should give plans the best terminology to use to explain complex pension information to participants in an easy-to-understand manner. One of the most recent model notices issued by the DOL was the model notice for multiemployer plans in critical status. Under the Pension Protection Act of 2006 multiemployer plans must calculate their funding status annually to determine if they are in endangered or critical status. Plans in critical status are required to adopt a rehabilitation funding plan that may cut back certain accrued benefits, including subsidized early retirement benefits. Plans are then required to notify participants of the plan's critical status and the implications of the status on certain benefits. The DOL issued a model notice for plans to use when issuing the critical status notice.

Given that this notice explains to participants that they may lose accrued benefits, it is an extremely important notice. However we have received calls from plan participants who were baffled as to the meaning of the critical status notices they had received. Although their plans had followed the model notice it simply did not convey the information in a way that was accessible to plan participants. Shortly after the DOL published its model notice, we sent the link to employees on our listserv; more than 20 individuals submitted comments to the DOL saying that they could not understand the notice.

Disclosures that cannot be standardized, such as the SPD, present different issues. We agree with those who advocate tailoring SPDs to the ways adults process information. We support suggestions made by several witnesses for the 2005 Working Group on Communications to Retirement Plan Participants that SPDs be structured according to participant life events and include an index or summary for quick reference. In addition, SPDs should be required to highlight up-front any features that could reduce benefits, and should not be permitted to include disclaimer statements. EBSA could help plan administrators and participants by drafting guidance on writing SPDs that participants can understand.

Compliance assistance

We suggest that the DOL look for additional proactive steps to provide plans with compliance assistance. Many plan administrators are employers and are not in the business of administering

pension plans. In our pension counseling work we often encounter plan administrators that are as unknowledgeable about the law and their own plans as the participants.

We recommend that the DOL establish a listserv that anyone -- plan sponsors and participants alike -- could join. This listserv could provide subscribers with general information and helpful periodic reminders of upcoming due dates. The listserv could also remind plans and participants on the proper deadlines for responding to participant requests, and what types of documents participants are entitled to receive.

Until the late 1990's all plans were required to submit a copy of the Summary Plan Description (SPD) to EBSA. We were told by plan consultants that this prompted small firms that otherwise might not have written an SPD to provide them to their participants. The massive collection of paper SPDs became a burdensome responsibility for EBSA, which housed the collection in a warehouse in Virginia. Now that we are in an electronic era, the warehouse of paper is unnecessary, and EBSA could easily collect scanned SPDs. We suggest that the Council consider recommending that EBSA propose giving plans the option of either submitting their SPDs or posting them on a plan's web site.

Projections and estimated benefits

The Council has asked whether participants receiving individual benefit statements would benefit from receiving projected estimated benefits for various retirement ages, as is currently provided in the Social Security Administration's annual statements. We certainly agree the Social Security benefit estimates, including the projections of future benefits, are helpful. But one of the main reasons they are so helpful is because we know that regardless of what happens to our 401(k) or our pension or our job, we can rely on the fact that Social Security will be there for all of us when we retire.

Unfortunately the same can not be said for defined benefit pensions. DB plans may be frozen or terminated at any time. Plans by choice or operation of law may be forced to reduce benefit accruals or terminate the plan entirely. Furthermore, employees are not guaranteed a job with the plan sponsor for the remainder of their careers. Because there are so many uncertainties about the future of an individual's pension benefit, it can be misleading to provide individuals with projected benefit estimates.

The Pension Rights Center serves as the technical support center for the Administration on Aging's Pension Counseling and Information Program. We frequently hear from the AoA pension counseling projects about their clients' troubles with benefit estimates and projections. One problem is that projected benefit estimates use assumptions that are not clearly defined. These undefined assumptions lead participants to believe they are entitled to larger benefits than they ultimately earn. It causes confusion, disappointment and grief. Not only are participants damaged by misleading benefit projections, but plans are often forced to spend additional time and money explaining the estimates and perhaps defending them in a future claims proceeding, and even costly litigation.

We are aware that many plans currently provide projected benefit estimates to defined benefit plan participants. For this reason we recommend that EBSA issue guidance laying out specific parameters that plans must follow if they choose to provide benefit projections. This can be done in the context of the model notice that the Pension Protection Act requires EBSA to

publish. We would be pleased to work with Council members and EBSA staff in preparing one or more plain-English model notices that will provide participants with a realistic understanding of the benefits they have earned under their plan, as well as estimates of possible future benefits they may or may not earn.

It is also critical that such notices alert employees to all circumstances that could cause them (or their spouses) to lose some or all of their benefits, and that individuals be able to rely on the information provided to them in the notices.

Retirement savings plans present a very different situation. Many individuals in 401(k) plans make unrealistic assumptions both about the amounts they will accumulate over their careers, and about how much money these accumulations will provide in lifetime monthly benefits. We suggest that the Council consider recommending that the EBSA web site include links to reliable online calculators that EBSA benefit advisors can use to help individuals figure out how much lifetime monthly income their retirement savings plans are likely to provide.

Form of Disclosure

Combining multiple notices

Many of the disclosures that plans are required to provide to participants are complex and confusing documents but they are important. We recommend that each required disclosure be written and delivered separately as a stand-alone document. The Summary Plan Description (SPD) and individual benefit statement in particular should not be combined with other disclosures. The Pension Rights Center is especially concerned that providing investment information along with the SPD or benefit statement will overwhelm participants and result in these vitally important disclosures being ignored. We recommend that the only exception to the requirement that investment disclosures be provided separately be that the notice of a 401(k) participant's right to diversify out of employer stock be included with quarterly benefit statements. However, in all disclosures, each document should be separate and reproducible as a stand-alone document.

Electronic delivery

Electronic delivery of required disclosures can yield cost savings for plans. However, the cost savings must be balanced against the needs of participants and beneficiaries for access to plan information. The Summary Plan Description and individual benefit statement (Periodic Pension Benefit Statement) are two of the most important disclosures plan participants receive. It is important that participants read them and retain them while they are working under the plan, after they leave the plan, and well into retirement. Therefore, we suggest that these two crucial disclosures be delivered electronically ***only after the participant has communicated his or her consent to receive these documents electronically***. This affirmative election requirement should apply to all participants, including those who work with computers as part of their jobs

For all other disclosures we believe that electronic delivery is appropriate for employees who work with computers as part of their job. Employers should give employees time to view these disclosures and easy access to printers for printing the documents. For persons without computer access at their jobs, and for beneficiaries, electronic delivery should only be used after the participant or beneficiary has given the plan an affirmative consent. Many lower- and moderate-

wage workers do not use computers for their jobs and do not have home computers. They need the protection of a requirement that they affirmatively grant permission for electronic delivery.

In all circumstances electronic delivery should always be accompanied by the right to request a paper copy. This is particularly important to participants and beneficiaries who are not active employees yet have affirmatively consented to receiving disclosures electronically. Additionally, the manner of electronic delivery should be formatted to be readily printable, ensuring that systems for printing are compatible. People change jobs frequently and need printed copies of plan information for future reference, especially SPDs and benefit statements. Required notices should not be delivered using links or require the participant to conduct a search.

In our view, EBSA's current electronic disclosure provisions, with the modifications we have just suggested, go a long way to providing the right balance between the easier technology of electronic delivery at a job site and the needs of participants and beneficiaries. We suggest that the Council consider recommending that the DOL make the electronic disclosure rules mandatory rather than the current safe harbor.

We also suggest that EBSA be urged to amend the rules to prohibit use of voice mail or pre-recorded messages for required disclosures. Voice mail may be appropriate for delivery of daily account balances, but ERISA's required disclosures are too complex and detailed for voice mail and we fail to see how a plan could properly comply with duties to retain records if the plan utilized voice mail disclosures.

Finally, participants and beneficiaries often have difficulty receiving requested disclosures from plans. This is likely to be particularly true when electronic delivery services are contracted out. Requests beyond the ordinary may be laid aside. We suggest that EBSA benefit advisors be specifically tasked with providing immediate assistance to participants and beneficiaries who have requested written copies of electronic disclosures in a timely manner and have not received them.

DOL and IRS rules for electronic disclosure

The DOL rules for electronic disclosure are far more protective of participants than the IRS rules. We suggest that the Working Group recommend that DOL rules be the standard for both DOL disclosures and IRS disclosures and elections.

The IRS rules for electronic disclosure were drafted to conform to the requirements of E-SIGN, the Electronic Signatures in Global and National Commerce Act. E-SIGN established consumer protections that apply to electronic communications required by law. The IRS rules have two methods of electronic disclosure; the consumer consent method and an alternate method. The consumer consent method conforms to the principal standards of E-SIGN and requires prior permission for electronic disclosure.

However, the alternate method of electronic disclosure under IRS rules is an exemption from the consent requirements of E-SIGN. E-SIGN permits an exception when consumer consent will impose a substantial burden on electronic commerce and an exemption will not harm consumers. The IRS alternate method permits electronic disclosure without prior permission to those "effectively able" to access the medium. There is no distinction between employees who

work with computers and those who do not nor does the alternate method give special consideration to participants and beneficiaries who are not active employees. The plan administrator determines who is effectively able to access the medium. In our view this is not sufficient protection for participants. The alternate method also permits disclosure through oral communication and pre-recorded messages, which is not permitted under the consumer consent method.

Improvements to the EBSA web site

The DOL and in particular EBSA could make a few minor changes to its web site that could improve navigation of the site and ensure that ERISA disclosure information is found in one place. First, we recommend that the site publish all model notices for participants, including any IRS model notices in one easy-to-find location. Currently the DOL model notices are listed along with all other EBSA regulatory activity in chronological order of when regulations were issued. Combining the model notices in one place will make these notices easier for employers to access and use.

Secondly, we suggest that the web site include a list and descriptions of all required participant notices, including IRS notices. Similar to participant disclosures, this information could be listed according to timing, such as annually or when triggering events occur. Currently, the *Reporting and Disclosure Guide for Employee Benefit Plans* has brief descriptions of most notices along with the citation for the notice, but the *Guide* includes additional disclosures such as those to government agencies and health disclosures. Instead there should be a separate disclosure guide for retirement plans and their participants.

We thank you for the opportunity to present the views of the Pension Rights Center on these vital issues concerning disclosures to participants. We would be pleased to answer any questions you may have.