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May 22, 2024 *Submitted via Regulations.gov*

Attn: Request for Information—SECURE 2.0 Section 319—Effectiveness of Reporting and Disclosure Requirements
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-AC09, Request for Information—SECURE 2.0 Section 319—Effectiveness of Reporting and Disclosure Requirements**

Dear Agencies:

Please find below comments from the Pension Rights Center addressing the Request for Information[1] on Section 319 of SECURE 2.0,[2] issued by Department of the Treasury, Internal Revenue Service (IRS); Department of Labor (DOL), Employee Benefits Security Administration; and Pension Benefit Guaranty Corporation (PBGC) [together, the Agencies]. Section I of these comments identifies our overarching concerns with the RFI, and Section II addresses our responses to selected questions posed in the RFI.

**Introduction**

The Pension Rights Center (PRC), founded in 1976, just two years after ERISA's passage, is a national, nonprofit, nonpartisan, consumer organization committed to protecting and promoting the retirement income security of workers, retirees, and their families. For the past 48 years, the Center has helped individuals receive and retain the retirement benefits they have earned, educated them about their rights, and worked to improve the nation's retirement system. In addition, with support from the Administration for Community Living, PRC provides direct services to more than 2,000 individuals annually, as well as serving as the Resource Center for six regional pension counseling and information projects covering 30 states that provide hands-on help to individuals with retirement income problems. PRC's programs providing direct assistance to individuals enables us to identify systemic problems in the private pension system, and to bring the voices and concerns of workers and retirees to policymakers.

Given that 2024 is the 50th anniversary of ERISA, it seems fitting to begin with first principles. ERISA's primary objective was to secure the private pension system and ensure that participants and beneficiaries received their earned benefits. ERISA required enhanced disclosure and reporting to participants, imposed funding requirements, created vesting and accrual standards, prohibited cutbacks in and the alienation of benefits, established fiduciary standards for those charged with

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[1] DOL, Request for Information—SECURE 2.0 Section 319—Effectiveness of Reporting and Disclosure Requirements—SECURE 2.0 Reporting and Disclosure, RIN 1210–AC23, 89 Fed. Reg. 4215 (Jan. 23, 2024) ***available at https://www.govinfo.gov/content/pkg/FR-2024-01-23/pdf/2024-01077.pdf*** [hereinafter *Sec. 319 Disclosure RFI*].

[2] The SECURE 2.0 Act of 2022, Division T of the Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022) [hereinafter *SECURE 2.0*].

responsibility for plan administration, management, and investment, and provided aggrieved participants with ready access to the federal courts. Ten years later, Congress adopted the Retirement Equity Act of 1984, creating enforceable pension rights for spouses, divorced spouses, and surviving spouses. ERISA was not concerned with catering to the convenience of plan administrators or the profits of third-party service providers; it wasn't even really all that concerned with encouraging formation of plans. Rather, the goal was to ensure that when an employer established a plan, the employees covered by the plan could understand it and be confident that benefits earned under the plan would be paid to them and their beneficiaries. So, just like the authors of ERISA, the Agencies, in approaching the task assigned by Section 319 of SECURE 2.0,[3] should keep the interests of participants and beneficiaries (aka *consumers*) at the center of this endeavor. Thus, any consideration of financial service providers' claims about the "burdens" and" costs" of performing their important statutory functions should not be at the expense of consumers actually getting what they need.

## I. The Agencies Urgently Need to Do More than this RFI to Fulfill Their Charge under Section 319

Consumer advocacy groups fought for several provisions of SECURE 2.0,[4] including improvements related to consumer disclosures. One particularly important disclosure provision was Section 338,[5] requiring plan participants and beneficiaries to receive statutorily required retirement benefits statements on paper, unless the more consumer-protective 2002 safe harbor[6] for electronic delivery is used, or the consumer asks for electronic delivery. We strongly supported Section 338 because periodic benefits statements are among the most essential ERISA-mandated disclosures that participants and beneficiaries receive to assist in planning for retirement and to prove entitlement to benefits. The best way to ensure that these statements are actually received is to send them on paper delivered by mail. That reform was addressed in an earlier RFI on SECURE 2.0 disclosures.[7]

Another disclosure-related provision consumer groups advocated to include in SECURE 2.0 was Section 319, a directive to the Agencies to study, analyze, and report to Congress on the effectiveness of current reporting and disclosure requirements. Unlike Section 338, which was about ensuring receipt of one specific, critical disclosure, Section 319 is concerned with the effectiveness

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[3] *Id*., at 5353-5354.

[4] These provisions included establishment of a lost-and-found registry, recoupment protections, and derisking disclosures. K. Friedman, "PRC applauds passage of priority consumer protections in new retirement law" (Pension Rights Center News Release, Jan. 18, 2023), *available at* https://pensionrights.org/prc-applauds-passage-of-priority-consumer-protections-in-new-retirement-law/.

[5] *SECURE 2.0, supra* n.2, at 5373-5374.

[6] 29 C.F.R. § 2520.104b–1(c).

[7] DOL, Request for Information—SECURE 2.0 Reporting and Disclosure, RIN 1210–AC23, 88 Fed. Reg. 54511 (Aug. 11, 2023) [hereinafter *2023 Disclosure RFI*]. In response to that earlier RFI, the Pension Rights Center urged DOL to amend its 2020 safe harbor to condition its use on *access in fact* – by requiring plans to confirm that the participant/beneficiary actually opened or downloaded the *disclosure itself*, not merely opened an email or visited a website – before electronic delivery should be considered effective disclosure under this safe harbor. Comment Letter of Pension Rights Center to EBSA Re: Request for Information—SECURE 2.0 Reporting and Disclosure, RIN 1210–AC23 at 9-10 (Oct. 18, 2023), *available at* https://pensionrights.org/wp-content/uploads/2024/02/FF-PRC-comments-on-disclosure-Subsection-F-10-18-2023.pdf [hereinafter *PRC Paper Statement Comments*]. PRC also submitted comments in response to that same RFI in answer to inquiries unrelated to Sec. 338. Comment Letter of Pension Rights Center to EBSA Re: Request for Information—SECURE 2.0 Reporting and Disclosure, RIN 1210–AC23 at 9-10 (Oct. 18, 2023), *available at* https://pensionrights.org/wp-content/uploads/2024/02/FF-PRC-Response-to-DOL-RFI-RIN-1210-AC-23.pdf [hereinafter *PRC 2023 RFI Comments*].

of the overall disclosure design and delivery regime. We advocated for this provision because, if properly done, the required study could reveal whether participants and beneficiaries are actually receiving disclosures; whether, once received, the disclosures are informative and understandable; and whether and how disclosures are retained.

The Agencies have now issued an RFI on Section 319. In general, RFIs can be a good beginning step to guide later regulatory proposals or studies. However, the outcome contemplated under Section 319 is *not* a rulemaking project; nowhere does Section 319 direct the Agencies to issue regulatory changes to implement Section 319 of SECURE 2.0, or even to make regulatory changes on their own initiative. To the extent that any recommended changes are contemplated, Section 319 says that they should be recommended to the four committees of jurisdiction in Congress.[8] Instead, what Section 319 mandates is that the Agencies must conduct a genuine study and to report the results back to Congress in about 1½ years from now. For this task, on this timeline, this RFI is the wrong tool for the job.

The RFI's most central shortcoming is its misstatement of its statutory mandate, and its treatment of hard data collection as optional. Question 23 is the place where the RFI addresses Section 319(b)(3). Here, the RFI states that Section 319(b)(3) "*explicitly* provides that the Agencies *may* 'conduct appropriate surveys and data collection to obtain any needed information.'"[9] This is patently incorrect. Instead, Sec. 319(b)(3) *explicitly* states: "The agencies *shall* conduct appropriate *surveys and data collection* to obtain any needed information." This provision speaks to the collection of quantitative data, and makes its collection mandatory, not permissive.

That the RFI misconstrues the charge here is also reinforced by Question 23's heading, text, and placement. The heading, "*Alternative* methods for information collection," implies that surveys and data collection are optional alternatives to the information being gathered in the RFI. However, under Section 319, surveys and data collection are to be the *main* method; if anything, this RFI is the alternative method. The text also posits "*If* this authority [to conduct surveys and data collection] were used…," again as though real data collection was optional. Surveys and data collection should be a matter of when (and very soon), not if. Question 23 also asks about methods such as focus groups. Qualitative methods can be helpful for particular inquiries, like gauging understandability, but they are not a substitute for quantitative data on delivery methods and actual receipt/access in fact. Finally, the placement of the central mandate and charge of Section 319 as the next-to-last question in the RFI, under the heading "*Additional Questions*," makes it clear that hard data collection is erroneously being treated as an afterthought, secondary to the questions posed in the RFI.

Question 23 is not the only place in the RFI where the mandate for collection of hard data on the effectiveness of the disclosure regime is either disregarded or incorrectly treated as permissive. The Background section of the RFI states that Sec. 319 mandates a "wide-ranging review of each Agency's existing reporting and disclosure requirements…."[10] It then goes on to define this "review" in terms of reexamining previous DOL RFIs on disclosures, past ERISA Advisory Council inquiries, and old GAO Reports.[11] No mention is made of this "review" requiring the execution of surveys and data collection in order to gauge the effectiveness of existing disclosure requirements. Old

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[8] Sec. 319(b)(1), *SECURE 2.0, supra* n.2, at 5353-5354.
[9] *Sec. 319 Disclosure RFI*, *supra* n.1, 4221 (emphases added).
[10] *Id.* at 4215-16.
[11] *Id.* at 4217.

inquiries and reports may bear on some of the questions at issue here, but they do not satisfy Sec. 319's mandate. In addition, despite Question 10 being about a central question of the study – i.e., how plans are furnishing disclosures and whether consumers are actually receiving them – the RFI states only that commenters are "encouraged" to provide data and statistics on these practices.

By the same token, the RFI is the wrong tool for this job because it is inherently passive: it may pose many good questions, but it limits the Agencies to receiving whatever spun information and cherry-picked "statistics" that self-selected industry commenters choose to submit.[12] This is not "data" or data collection. Factual data on how plans and their third-party administrators are actually delivering disclosures – using which methods for what proportion of active workers, deferred vested participants, retirees, and beneficiaries – and the rate at which consumers are actually receiving them, *does* already exist. The RFI asks whether the plans have this information. It is clear that the plans already have it, since they regularly use it for marketing and other business purposes. As a matter of course, those using electronic delivery already automatically collect and analyze a whole panoply of detailed information whenever a consumer is sent an email or makes *any* use of a provider's website.[13] Moreover, all of this data is wholly in the possession and under the control of the plans and their third-party administrators. Consumer groups like PRC cannot access this data. But the Agencies can, and should do so here.

Under Section 319(b)(3), it is up to the Agencies to arrange for disinterested, government-supervised researchers to proactively obtain this data by requiring its submission. This would help ensure that the data collected covers plans of different sizes with different types of participants, and would reduce the opportunities for incomplete or selective information submitted by industry commenters to distort the data collected and ultimately any recommendations made to Congress. If the Agencies do not have the in-house bandwidth to conduct this research, they should hire contractors to do so. The manner in which this RFI handles Section 319 stands in stark contrast to the manner in which DOL recently handled a similar mandate for data collection and a congressional report under Section 344 regarding pooled employer plans.[14] In its last RFI, at the same time DOL asked a number of specific questions for comment, it also stated that it was in the "preliminary stages of planning such a study,"[15] and requested commenters' ideas for how to construct the study and to provide feedback on the methodology and scope of the study.[16] That RFI also stated that DOL "anticipates using data collected from the Form PR and the Form 5500 Annual Report"[17] to help prepare the report. Despite the similar mandates of Sections 344 and 319, this RFI contains *no*

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[12] While not a substitute for quantitative research, this RFI does ask plans to submit data on several issues. If the plans do not submit data or answer the questions, either they don't have it and are sloppy fiduciaries, or they are avoiding sharing it because it would be harmful to their financial interests. In any case, the Agencies would be entitled to draw an adverse inference from such failure to report data on the results of their disclosure practices.

[13] *See PRC Paper Statement Comments, supra* n.7, at 8-9.

[14] *See 2023 Disclosure RFI, supra* n.7, at 54512.

[15] *Id.*

[16] *Id.* PRC has many suggestions regarding the content of surveys. For instance, in addition to asking gathering data on current delivery methods, defaults, use of safe harbors, and opt-in/opt out behaviors, we would urge that plans using electronic delivery be required to report: the "fall-off" at each stage of the process (open email, visit website, log-in, access in fact to disclosure, etc.) for all key disclosures, detailed information on actual receipt by deferred vested participants, and detailed information from plans on how long, and in what form (digitized, paper) they retain benefits statements, plan documents, and all versions of key disclosures, notices, and elections (i.e., spousal consents, beneficiary designations, SPDs, etc.). PRC would welcome the opportunity to provide feedback on the scope and methodology for a quantitative study.

[17] *Id.*

indication that the Agencies are in the midst of constructing surveys and data collection methods, nor does it evince any intent to use reporting mechanisms like the Form 5500 that plans are already required to submit under penalty of perjury.
It makes no sense that DOL is apparently further along in planning a Section 344 study for a report due to Congress within 5 years of enactment of SECURE 2.0, than the Agencies are in planning a Section 319 study for a report due to Congress within 3 years of enactment. PRC welcomes the opportunity to provide comments on this RFI, but time spent on an RFI has the potential to displace the production of a real study based on surveys and data collection. In order to have time to make a meaningful report to Congress by December 29, 2025, the Agencies need to launch an immediate effort, concurrent with the RFI, to construct their study and require plans and providers to submit this "fact-based"[18] data now.

## II. Responses to Questions Posed in RFI on Effectiveness of Reporting and Disclosures

### Question 1: Number of required disclosures

In evaluating the number of required participant disclosures, it is important to keep in mind that participants only receive those disclosures applicable to their plan and individual circumstances. The number of required participant disclosures varies according to the type of plan, either defined benefit or defined contribution, and the choices made by each participant. For example, participants in self-directed 401(k) plans receive information about investment choices and the fees on investments, information not needed by participants in defined benefit plans. Similarly, participants in defined benefit plans may face complicated choices about pension risk transfers or plan funding warnings that are not part of defined contribution plans. Each disclosure should be evaluated according to its purpose and potential consequences.

Summary plan descriptions (SPDs) and individual benefit statements – including deferred vested statements – are among the most important disclosures received by participants. All participants receive these basic disclosures at times specified under ERISA. The SPD provides crucial information about the plan, the features of the plan and how benefits are calculated and accumulated. This is key for people to understand the rules of the plan so they can protect themselves. Individual benefit statements show participants the benefits they have earned by a certain period of time, and later are crucial when proving entitlement to benefits. While it is feasible to combine other notices that contain similar subjects and have similar timing requirements, we strongly believe that SPDs and individual benefit statements should only be delivered as stand-alone documents.[19]

All required disclosures should be available on request in the participant's preferred form, either paper or electronic, including the governing plan documents.

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[18] Question 9 in the RFI characterizes analysis of how participants and beneficiaries provide their preferred contact information to plans as "fact-based" in "nature." *Sec. 319 Disclosure RFI*, *supra* n. 1, at 4219. However, there is nothing any more or less "fact-based" about this than there is about the central questions underlying Sec. 319: how plans are delivering which disclosures to whom, and the rate at which consumers are actually receiving them, especially in the case of electronic methods of delivery.
[19] *See* PRC comments on combining notices in response to Question 22 of the 2023 RFI, *PRC 2023 RFI Comments*, *supra* n. 7, *at* 6.

The total number of disclosures should not be a problem for participants when they are informed of the purposes of the disclosures. (See our comments under Question 4 below.) Combining several automatic enrollment and contribution notices makes sense because the notices relate to the same features of the plan and have similar timing requirements. Combining notices should be done with care and with an explanatory introduction. Combined notices should not be presented as a string of separate notices cobbled together or presented as one notice that combines parts of several required notices. Additionally, 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.

Some notices should not be combined at all. Specific notices that require action by the participant, such as a decision whether to change investments prior to a black-out period, should not be combined with other notices. Nor should deferred vested statements or notices directed to spouses, particularly requiring spousal consent or action, be combined with other notices. Also, as we mentioned above, SPDs and benefit statements which provide basic information to participants about the operation of their plans and the benefits they have earned should not be combined with other notices.

**Question 2: Timing of required disclosures**

Timing is extremely important for disclosures. Disclosures that require action or choices must be timed to give sufficient advance notice of an opportunity or requirement to act, 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. The Department of Labor's usual standard of no more than 90 days or less than 30 days in advance of a deadline is reasonable.

The timing of delivery of disclosures should not be predetermined according to some abstract definition of life-events. Since life-events progress differently for different participants, the timing of delivery should not be based on life-events.[20] As stated in our 2020 comments, "the Labor Department could help plan sponsors and administrators to navigate ERISA disclosures by grouping required disclosures on the EBSA website by stages of employment, such as joining the plan, annual notices, triggering events, and 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."[21]

Also, as we recommended in prior comments, the Labor Department could recommend in guidance, a Summary/Quick Start Guide, that would be organized as we suggest above. However, we emphasize that **the *complete* SPD should always be provided when required or requested in the paper or electronic format that the participant has selected.**[22]

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[20] See PRC comments on Q-5 (Jan. 9, 2020), *available at* https://pensionrights.org/resource/comments-to-the-labor-department-on-the-effectiveness-of-erisa-disclosures/, filed in response to DOL's 2019 RFI on the Effectiveness of ERISA Disclosures, at 84 Fed. Reg. 56894, 56908 (Oct. 23, 2019).

[21] *See* PRC comments*, id.*, at comments on Q-5 and Q-7.

[22] PRC statement on Mandated Disclosures for Retirement Plans to the ERISA Advisory Council, at 4, (June 17, 2017) *available at* https://pensionrights.org/prc-statement-to-the-erisa-advisory-council-on-retirement-plan-disclosures-june-7-2017/.

**Question 3: Content of required disclosures**

When determining whether a particular disclosure is duplicative, the Agencies should consider timing and the type of plan. Disclosures should be timely and provided within a reasonable period of time for action and understanding. Similarly, a disclosure that duplicates information provided to participants in self-directed 401(k) plans may still be necessary for participants in ESOPs (Employee Stock Option Plans). In general, studies have found that consumers benefit from repetition and reminders.

**Question 4: Comprehension of information furnished in required disclosures**

It is critical that disclosures are provided in a holistic manner and provide all ERISA and plan required information, particularly the summary plan description (SPD). If portions of disclosures are buried within other disclosures that are sent for other purposes, it makes the information less noticeable to the participant and less likely to be read. Further, if pieces of information are scattered in different notices, the information is less likely to be found or retained for future reference and can create gaps in legal documentation. Having all relevant information to prove one's entitlement to benefits, and the type and amount of those benefits all in one place, is critical to enabling older workers, retirees, and family members to find and claim their benefits. Technical language should be minimized and explained in simple, understandable language, as much as possible. (Also, see Question 5 below.)

Comprehension of all required disclosures would be improved if the disclosures included a few sentences in the beginning that answer the following questions:

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

**We strongly recommend that the Labor Department, or other responsible agency, write an introductory paragraph for each required notice in language understandable to the average participant.** The introductory paragraph we recommend would be generic, providing general information about the notice itself. Additionally, the most relevant information in the notice for participants should be presented first, with more detailed information given later. We further recommend that the agencies supply, and require plans to use, model language for descriptions of notices.

**Question 5: Plain English; foreign language-based issues; underserved communities**

The best way to determine whether notices and disclosures are understandable is to periodically conduct a survey or focus group of participants and beneficiaries. The three agencies should conduct readability testing (there are established methods to do so) of the most important participant documents they regulate. Based on the research results, the Agencies should write model language for the disclosures.

DOL previously proposed requiring "…short sentences without double negatives, everyday words rather than technical and legal terminology, active voice, and language that results in a Flesch reading ease test score of at least 60 … [to] satisfy the average participant understandability requirement."[23] It is important to recognize that an "average plan participant" may vary by industry and employer/employee location. Employers and plan officials should consider the demographics of their workforce when drafting notices.

Plans should be responsible for providing, at a minimum, Spanish translations, and preferably more language translations if they have a particular ESL (English as a second language) community in their workforce and plan. DOL model notices will help with easier language translations.

**Question 6: Accessing required disclosures and**
**Question 10: Delivery—furnishing disclosures to participants and beneficiaries**

Because actual receipt of disclosures is thoroughly intertwined with how disclosures are furnished and delivered, our comments on Questions 6 and 10 are combined.

Questions 1-5 above inquire as to the timing of disclosures, as well as to their content and understandability. These aspects of the disclosure regime are certainly crucial in order for disclosures to be considered effective. However, none of these factors will matter if participants and beneficiaries never *actually receive* the disclosures. **Actual receipt is a critical cornerstone of effectiveness.**

Thus, a central question to resolve – whatever terminology is used – is what constitutes "actual access," "access in fact," or "actual receipt" of disclosures delivered electronically.[24] In the last SECURE 2.0-related RFI, in subsection F on the requirement for paper statements under Section 338, DOL defined "actual receipt" in terms of whether an individual opens or downloads the disclosure from the website, and asked whether plan administrators should be required to monitor and confirm access in fact.[25] PRC agreed that *confirmed* opening and/or downloading/printing of a disclosure should be considered actual receipt.

In this RFI, however, access in fact appears to be defined somewhat differently: "[t]he Agencies understand 'access' to refer to the extent to which participants and beneficiaries open and look at, review, or consult the disclosure for purposes of using its information, either contemporaneous with the receipt of the disclosure or at any point in the future."[26] This definition is a good start because it

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[23] DOL, Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, RIN 1210–AB90, 84 Fed. Reg. 56894, 56903 and 56922 (Oct. 23, 2019).

[24] In the case of paper disclosures sent through the mail, paper delivery need not be confirmed because it has long been considered highly reliable. Mail that isn't deliverable gets returned, and research by the direct mail industry indicates that paper mail has a 90% open rate, compared with only a 23% open rate for email. Compu-Mail, *Direct Marketing Statistics for 2022* (posted June 14, 2022), *at* https://www.compu-mail.com/statistics/30-direct-mail-statistics-you-can-use-right-now [hereinafter *Compu-Mail Statistics*]. Presumably, home-delivered mail from one's employer or retirement plan would have an even higher open rate (so would email, but not as high as paper mail). "In any case, the technology used for notice-and-access can confirm opening/downloading – confirmation that a consumer has actually opened a disclosure is one of the few real advantages of electronic delivery over snail mail – and it is in the interest of workers and retirees for each delivery system to be required to be as effective as it possibly can." *PRC Paper Statement Comments*, *supra* n.7, at 9-10.

[25] *2023 Disclosure RFI*, *supra* n. 7, at 54515.

[26] *Sec. 319 Disclosure RFI*, *supra* n.1, at 4219.

requires that individuals actually open the disclosure; downloading or printing the document *from* the website without opening it *on* the website should also suffice. In any case, all three of these forms of access-in-fact should be paired with a requirement that the plan administrator confirm actual receipt. Reviewing or consulting a disclosure is certainly important in order for the recipient to get anything out it,[27] but these are hard behaviors to confirm. Confirmed opening/downloading/printing of a disclosure from a website also has the added benefit of demonstrating "effective ability to access" an electronic disclosure, which would satisfy the Treasury/IRS' conditions for allowing electronic delivery.[28] As for a permissible standard of *when* actual receipt is confirmed, "at any point in the future" is too nebulous. To be considered actual receipt/access-in-fact, the Agencies should require the plan administrator to confirm access-in-fact within a reasonable amount of time of having sent a disclosure or notice, taking into account the type of disclosure.[29] If access is not confirmed after a reasonable amount of time, the plan administrator should be required to follow up and revert to paper.

Questions 6 and 10 ask about the existence of hard data on what delivery methods plans are using, whether participants are opting out of electronic defaults, and whether entities have the tools to discern whether participants and beneficiaries are actually accessing disclosures. The answer to these questions is yes, the data exists, the plans already have it, as we have noted in prior comments.[30] Plan administrators and recordkeepers already have the capability to confirm whether emails are opened and disclosures are actually accessed because those capabilities are built in to their software. The entities that administer plans and handle recordkeeping essentially state as much in their privacy policies.[31] They also know what percentage of participants and beneficiaries are defaulted into one delivery method or another, and what proportion of those so defaulted have opted in or out of their assigned default. We recommend that the Agencies send out their own researchers or contract with neutral researchers to conduct a quantitative study and require the plan administrators and their web analytics teams to share that data.

Questions 6 and 10 also ask about rates of receipt and whether the frequency of actual access to disclosures varies based on the method of delivery. In addition to the far higher open rate for paper mail than email already cited above,[32] there is the inertia and "sludge"[33] inherent in a default system of electronic disclosure. The now-established body of behavioral economics research teaches that using defaults as part of "choice architecture" is extremely powerful and makes a major difference in people's behavior and choice outcomes. A disclosure regime that makes electronic delivery the default form of delivery capitalizes on people's *inertia* – faced with the pressures of everyday life and competing priorities, inattention and inaction are far easier than having to take the initiative to seek out additional information. To access an electronic disclosure, a participant must receive, notice,

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[27] *See generally*, *Intel Corporation Investment Policy Committee v. Sulyma*, 589 U.S. __, 140 S. Ct. 768 (Feb. 26, 2020) (A participant does not necessarily have "actual knowledge" of the information contained in disclosures that he/she receives but does not read or cannot recall reading).

[28] *See* 26 C.F.R. §1.401(a)-21(c)(2) and (d)(2).

[29] For example, for a notice requiring action, the allowable time should be short so as to leave enough time to follow up with a paper notice sent by mail, plus time for the recipient to act. If the disclosure is one of those considered essential for proving entitlement to benefits, like SPDs and deferred vested benefits statements, the allowable time for accessing the disclosure should be up to about 4 weeks, after which time the plan administrator should follow up by mailing a paper version of the disclosure.

[30] *PRC Paper Statement Comments, supra* n.7, at 8-9.

[31] *Id.*

[32] *See Compu-Mail Statistics, supra* n. 24.

[33] *See generally*, Richard Thaler & Cass Sunstein, *Nudge: The Final Edition* (2021).

open, and read an emailed notice of internet availability, find the time and make the extra effort to go visit the website, recall one's password to log into the website (likely with two-factor authentication), and then wade through a gauntlet of marketing pitches and possible pathways to actually locate the disclosure. All of this time and effort is to be contrasted with having a disclosure on paper delivered to one's mailbox, a tangible item in one's hands, already printed out and ready to read after simply opening an envelope.

Question 10 asks to what extent age and other demographics are relevant to participants' and beneficiaries' effective access to and use of electronic delivery. They are highly relevant. Meaningful computer and internet access are necessary preconditions to being able to access disclosures online. And, despite increased access to the internet via smartphones and broadband internet, there is still a noticeable digital divide in this country, "by age, household income and educational attainment."[34] For instance, those 65 and older are the age group least likely to have home internet; 30% do not subscribe to home broadband.[35] Broadband and cell service are costly. Among those in households earning less than $30,000/year, 43% do not have home internet, and 21% don't have cellphones. Nearly 3 in 10 (28%) of households at that income level, and nearly one-fifth (19%) of households earning $30,000 to $69,999 per year, are dependent on cellphones to go online.[36] Moreover, it is important to note that access to the internet is not a valid proxy for actual receipt of electronic disclosures. For purposes of assessing effective access to disclosures, those who are dependent on smartphones to access the internet should be deemed to *lack* effective access: smartphones are unsuitable devices for reading and retaining complex financial documents.

Finally, Question 6 asks about best practices for ensuring that participants and beneficiaries have ready access to relevant information at the time they need it, and that they *know* they have such access. Clearly, in the first instance, this requires participants and beneficiaries to have actually received their disclosures. Policies such as defining plan responsibilities to be satisfied upon sending an email "notice of internet availability," requiring consumers to chase down the disclosures, and allowing plans to wipe them off the plan website after the later of one year or when replaced by a newer version – all practices that are part of the Department of Labor's notice-and-access disclosure regime – are not conducive to actual, timely access. In addition, whether participants and beneficiaries have access *at the time they need it* clearly relates to the issue of *retention* of disclosures. We comment on that part of the "ready access" issue next under Question 7.

**Question 7: Retaining disclosures after receipt**

In order for participants and beneficiaries to have ready access to relevant information *at the time they need it*, the disclosures not only need to have been received, they also need to be *retained*. People often file away or stuff their retirement disclosures in a shoebox until they need them,[37] which is usually many years after the disclosure was made. In the experience of PRC and the pension counseling

[34] Pew Research Center, *Americans' Use of Mobile Technology and Home Broadband* (Jan. 2024), *available at* https://www.pewresearch.org/internet/2024/01/31/americans-use-of-mobile-technology-and-home-broadband/.
[35] *Id.*
[36] *Id.*
[37] After reviewing a paper benefits statement, roughly three-quarters of adults keep it either for a period of time or indefinitely. After reviewing an electronic benefits statement, the majority do nothing with it. AARP, *Retirement Account Statements: Paper Or Electronic?* at 21-22 (2022), *available at* https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2022/retirement-accounts-statements-survey-report.doi.10.26419-2Fres.00529.001.pdf.

project attorneys throughout the country who work with clients who are facing benefit denials and miscalculations, recovery of benefits often hinges on whether participants and beneficiaries have the various plan documents and benefit statements they need to prove their entitlement. When those documents disappear, retirees' rights to their benefits can also disappear. Thus, as with actual receipt, retention of key disclosures is absolutely critical to ensuring that participants and beneficiaries have the documents they need to enforce their rights.

Question 7 properly recognizes that retention is critical to an effective disclosure system, but it puzzlingly focuses on the behavior of participants and beneficiaries – and seems mostly concerned with access issues – when it should be focused on the retention behavior of plan sponsors, plan administrators, and their third-party providers. Consumers should certainly be advised and repeatedly reminded to hold on to copies of key documents, whether they be in paper or electronic form. Hopefully, they will retain documents for the possible decades that go by after receipt. However, even in spite of good intentions, paper can be lost, and home computers can break, or digital documents can become unreadable with outdated hardware, operating systems, and software. Anna-Marie Tabor, Visiting Professor of Law at the University of Massachusetts School of Law, recently testified to the ERISA Advisory Council that "[t]he quality of a retirement plan's recordkeeping can make or break participant access to benefits. … Lost benefits were the most frequent problem I encountered, and almost every lost benefit involved missing or inaccurate records."[38]

Participants should retain certain disclosures indefinitely, such as the SPD, benefit statements, deferred vested statements and others. Disclosures that will be needed later to claim benefits should be clearly identified at the beginning of the disclosure, as we noted above in Question 4. We recommend that the Agencies, especially DOL, draft model language that identifies these disclosures as such to alert participants and beneficiaries to save them, and then require plans to use that language to prominently highlight the importance of a disclosure and clearly urge participant retention.

However, the regulations and policies of the Agencies should not permit employers or plans to treat participants and beneficiaries as if they are responsible for retaining plan or participant information.

It is the *plan sponsors' legal responsibility* to retain documents. In testimony before the 2023 ERISA Advisory Council, Norman Stein, the Center's Acting Legal Director, stated that "Section 209 provides that the ultimate keeper of such records, with the responsibility for record retention, is the employer." [39] Section 209 of ERISA states that "every employer shall, in accordance with such regulations as the Secretary may prescribe, maintain records with respect to each of his employees *sufficient to determine the benefits due or which may become due* to such employees."[40] Because benefits may

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[38] Remarks of Anna-Marie Tabor to the ERISA Advisory Council on Recordkeeping in the Electronic Age, at 1 (Sept. 20, 2023), *available at* https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2023-recordkeeping-in-the-electronic-age-tabor-written-statement-09-20.pdf.

[39] Statement of Norman Stein, Acting Legal Director, Pension Rights Center, before the ERISA Advisory Council on Recordkeeping in the Electronic Age, Sept. 20, 2023, at 7, *available at* https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2023-recordkeeping-in-the-electronic-age-stein-written-statement-09-20.pdf.

[40] 29 U.S.C. § 1059 (emphasis added). *See also*, R. Moore, "AICPA Reminds Plan Sponsors of Record Retention Rules," *PlanSponsor* (May 16, 2019), *available at* https://www.plansponsor.com/aicpa-reminds-plan-sponsors-record-retention-rules/ (proposed-but-never-finalized DOL regulations in 1980 put retirement plan sponsors on notice that participant records

not become due until decades after a disclosure or notice was sent, Section 209 requires plans to retain records necessary to determining benefits until the participant and all possible beneficiaries have been paid their benefits. Section 209 does not place any time limit on this requirement.[41] The IRS position on record retention for plan sponsors agrees. "You should keep retirement plan records until the trust . . . has paid all benefits and enough time has passed that the plan won't be audited. Retirement plans are designed to be long-term programs for participants to accumulate and receive benefits at retirement. As a result, plan records may cover many years of transactions. The Internal Revenue Code, Income Tax Regulations and the Employee Retirement Income Security Act of 1974 (ERISA), as amended, require plan sponsors to keep records of these transactions because they may become material in administering pension law."[42]

With respect to service providers hired by plan sponsors and administrators, an equivalent rule must apply. The Agencies must make clear to employers and plans that they must legally ensure and bind each service provider, and their successors, in all applicable contracts, of their legal obligation to retain and make available all versions of plan documents required to be retained under law, including timely transferring all documents to the plan when required or requested and before contract termination.

Thus, Question 7 should be asking *plans* and their service providers about *their* retention practices regarding plan documents, participant benefit statements and underlying earnings records, beneficiary designations, and spousal benefit elections, etc. In what form are they retaining these documents, for how long, and how do they, and plan participants and beneficiaries, retrieve or access those records decades later? How are plans ensuring that plan records are retained given the ubiquity of third-party administrators and recordkeepers? What about successor recordkeepers? Successor plans? Because record retention requirements are a critical aspect of an effective system of disclosure, and because record retention is the job of plan sponsors, the Agencies should collect and report on this data as part of their Section 319 report to Congress.

**Question 8: Participant and beneficiary engagement; decision- making**

The Agencies ask "if" plans collect data on participant engagement, what data, and how such data is used. The Agencies also need to consider "can" and "should" plans collect and use some or all received data. In addition, the Agencies should ask data experts and researchers, especially those active in retirement and financial asset practices, the extent to which data can and should be used, and then limit to only the data necessary to administer the plan. The Agencies should recommend and propose the regulatory limits of the data that may be retained by employers, recordkeepers, and other contractors as well, and each party needs to know who holds, directs, reviews, and uses all data.

Do plans and service providers know how often participants and beneficiaries visit a website or open emails or text messages? A basic Google search shows several sites stating that large

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should be retained for "as long as a possibility exists that they might be relevant to a determination of the benefit entitlements of a participant or beneficiary.").

[41] ERISA contains two distinct provisions regarding plan retention requirements for disclosures. ERISA section 107, 29 U.S.C. §1027, requires persons subject to ERISA reporting requirements to retain and keep available for at least six years all records related to *agency filings*, including participant and beneficiary records.

[42] IRS, *Maintaining Your Retirement Plan Records*, *at* https://www.irs.gov/retirement-plans/maintaining-your-retirement-plan-records.

percentages of e-mails are unread or are never received: 35% of emails are left unread[43] and 65% of emails are ignored.[44]

Decades of ERISA experience have found that while many participants do not fully read or understand all plan disclosures, a key percentage of participants do, and they act to protect the rights of all plan participants and beneficiaries.

Are there best practices to protect sensitive or confidential information? The Agencies should review and incorporate the best relevant State privacy laws, such as California's. The European Union also has enacted data protection standards that are influencing U.S. based practices and should be considered.

**Question 9: Provision of preferred contact information to plans**

For payroll and tax filings, all employers must know employee name and contact information. When employers establish employee benefit plans, employers provide this information to the plan.

It would be easier for participants to stay in touch with their plan if they were given a choice about how to receive plan information. For a number of years, the Center has suggested that employers and plans be required to initially and periodically contact participants and ask how they want to receive plan information (in place of a default regime). It is a simple and easy question to periodically ask.

Employers and plan representatives have resisted this requirement because they prefer the shift to default electronic delivery. The shift from paper to electronic delivery has assisted employers and plans with reduced numbers of certain types of administrative employees and postage costs, however there are also great costs associated with computer design and employment as well as cyber theft protection costs. Since all plan expenses are directly or indirectly paid by participants, employers or plan administrators are making the decisions, but participants pay all costs either way despite their needs and wishes. Plans should indeed be required to ask how participants and beneficiaries want to be contacted (via email, paper mailings, etc.) and the appropriate address for doing so. Then, plans should be required to ask again upon status changes (e.g., separation from service) and periodically (e.g., every two years). Additionally, <u>if a plan gets a returned mailing or bounced back email, then it should be the plan administrator's or service provider's responsibility to locate the participant or beneficiary and update the plan's address records.</u>

<u>We strongly recommend that each benefit statement (whether paper or electronic), should be required to include a sentence written by DOL that reminds the participant to update their personal information, address, beneficiaries, phone number, etc., and that includes a specific plan contact for updating information.</u> A regular reminder will help participants to stay in contact with their plans. When plans lose track of participants, it is the participants who are most impacted and may fail to receive their earned benefits. DOL could issue a Field Assistance Bulletin for field offices to review

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[43] Anastasiia Kryzhanovska, 35% of Emails Are Left Unread: A Data-Driven Analysis," *Mailbird Blog*, (Oct.29, 2020) at https://www.getmailbird.com/email-use-statistics/.

[44] Shep Hyken, "Sixty-five Percent of Emails Are Ignored," *Forbes* (Oct. 4, 2020), at https://www.forbes.com/sites/shephyken/2020/10/04/sixty-five-percent-of-emails-are-ignored/?sh=3d1e9f471e6a.

plan practices of maintaining contact with participants and beneficiaries. DOL already has guidance on best practices for maintaining contact with participants.[45]

**Question 11: Availability of model notices or model language**

The agencies are to be commended for the model notices they have issued over ERISA's many decades. The model notices, with rare outliers, have been invaluable. The Agencies have been careful to include and highlight important rights and obligations, and use understandable terms and wording. We have recommended on many prior occasions that DOL draft plain English model notices. Depending on the type and purpose of a notice, DOL should require the use of the model notice or key language. DOL could include its models in the "Disclosure Guide" for easy use by employers and plans. Employers and plans have long publicly stated that Agency drafted models save plans time and money and reduce plan fears of confusion and liability. The Agencies try to test participant understanding of possible model notices, and we encourage the Agencies to test all models with a representative sample of participants. Many, if not all, consumer groups, especially those with members, stand ready to assist with organizing and carrying out any model notice tests now and in the future.

The Agencies ask if/how participants and beneficiaries can understand plan fee and investment disclosures. We recommend that DOL write model language that would explain in very general terms plan administrative costs and investment fees and how they should be combined to understand the full costs of investments. Plan costs are disclosed in different formats in two main disclosures - 1) plan administrative costs are stated on participant benefit statements, and 2) investment fees are disclosed on the comparative investment fee chart. (Other plan costs are disclosed on the annual plan report, Form 5500.) It is likely that participants do not understand the differences between all of the different costs and do not add the total of all of the varied costs offset against their pension benefits. The Agencies also ask about disclosures that show benchmark investment funds. The Agencies should examine the most common investment benchmarks, how plans select investment benchmarks, and survey participants on their understanding of investment benchmarks. The Agencies should survey a valid sample of participants and beneficiaries on their receipt, understanding and satisfaction.

**Question 12: Participant and beneficiary feedback regarding notices and disclosures**

EBSA and PBGC have long responded to participant and beneficiary questions and concerns and we strongly urge the Agencies to review their databases on notices and disclosures questions and concerns.

Similarly, as we are stating throughout our RFI comments, the Agencies must design and carry out a scientifically reliable survey on each of the key points it has raised, and directly ask participants about disclosures. Additionally, the Agencies should require plans to proactively ask participants about their concerns regarding communications, common themes, etc., and report back to the agencies as requested. In addition, there are many professional retirement research organizations and

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[45] EBSA, *Missing Participants – Best Practices for Pension Plans* (Jan. 12, 2021), *at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/best-practices-for-pension-plans.

universities, worker and retiree organizations easily willing and able to design or assist with carrying out one or more surveys.

**Question 13: Costs of disclosures**

The Agencies ask many questions about plan and sponsor disclosure costs. The Agencies must first define what they mean by "costs". There are numerous possible types of costs. The Agencies must be clear that costs include the costs of electronic design and delivery, cybersecurity, cyber information protection insurance and cyber theft. Employers and Agencies should balance the costs to the benefits of disclosures to participants and beneficiaries in understanding their plans, how they operate, their rights, how to earn and claim benefits, etc. At all stages, the Agencies should be clear and focused on the main purpose of ERISA required disclosures — to protect participants and beneficiaries and enable them to monitor their plans and claim their benefits (not plan cost minimization.) Plan costs separately are required to be reasonable.

The Agencies also must scientifically and neutrally design and ask these questions. The Agencies should not ask or in any way use employer, plan or service provider information that could be unscientific, or designed to produce a specific response. Again, as stated in our introduction, the Agencies must draft or contract for the design of scientifically neutral questions and a neutral representative response sample(s).

**Question 20: Use of reports and data by participants and beneficiaries**

Participants, beneficiaries and their advocates who search for former employers who are holding their benefits rely on information in the Form 5500s that are on file and publicly available at the Department of Labor. The Center receives calls every week from participants and beneficiaries trying to locate their benefits from former employers. Additionally, we refer participants to the Form 5500s when they are concerned about the financial soundness of their plans. The Form 5500s are an invaluable resource.

The PBGC has records from defined benefit plans that file for a standard termination, which often includes the name of the insurance company where annuities were purchased and information on distributions made to participants. However, these records are not public. It is necessary to make a special request to the PBGC to obtain these records when searching for plans that went through a standard termination. We have requested that the PBGC develop a searchable list of participants in standard termination plans, or a searchable list of the insurance companies affiliated with terminated plans.

Unfortunately, there is no *requirement* for terminating defined contribution plans to report where they have sent the money in the accounts of participants who could not be found at the time of plan termination. These participants, when later looking for their benefits, have no idea where the money went. Although the PBGC maintains a voluntary program for employers to report where participant accounts were sent, there is no requirement to do so. **We strongly recommend that the PBGC require terminating defined contribution plan administrators to report where unclaimed**

**participant accounts were sent so that those accounts can later be claimed by the participants.**[46]

**Question 21: Use of reports and data by other entities**

Good data is needed for researchers and policy-makers to evaluate the changing landscape of retirement plans. We recommend that the Agencies collect data in the following areas:

- Automatic enrollment 401(k)s: the percent of participants automatically enrolled who opt-out, and by part-time and full-time status.

- All self-directed 401(k)s: the percentage of participants who remain with the plan's default investment options; the percent who take a loan or hardship withdrawal; the percentage of participants who receive a forced-transfer of their account balances and the percentage of participants who could not be located for the account transfer and had their account balances transferred to an IRA or annuity provider.

- Fees and investments in self-directed 401(k)s: what are the fees charged for specific services requested by participants; how often does the plan change investment options; what is the total number of investment options available to participants in the plan.

- Spouses: What is the percentage of spouses who decline the spouse benefit?

- Does the third-party administrator acknowledge a fiduciary status?

- All plans: Report the proportions of participants by gender, age and race.

**Question 22: Coordination of Agencies' reporting and disclosure requirements**

Question 22 asks whether participants and beneficiaries would benefit from increased coordination between the Agencies regarding one or more of their disclosure requirements, and whether these disclosure requirements could be effectively harmonized. Different agencies have jurisdiction over different disclosures, and different types of disclosures may warrant different types of protections. There is no legal or practical imperative to harmonize regulatory standards as between the Agencies. Coordination and uniformity of regulatory requirements only benefit participants and beneficiaries if the standards to which all conform is defined by the set of regulations are the *most* protective of participants and beneficiaries. In PRC's experience, however, plans and their industry providers seek to "coordinate" disclosures by deeming compliance with the *least protective* regulations to be sufficient.

At this time, we don't know whether participants and beneficiaries are actually receiving disclosures under DOL's notice-and-access safe harbor. Answering that question – determining the effectiveness of those current requirements – is precisely what Section 319's mandate for an empirical study is all about. For the Agencies to suggest that coordination and harmonization could

[46] The Pension Protection Act of 2006 gave PBGC the option to require the reporting of missing participant names and account locations when accounts are not transferred to the PBGC.

be warranted, without having first gathered data on what's really going on, would be premature and irresponsible. In addition, for some reason, this RFI never really mentions disclosures and elections that are most significant to participants and beneficiaries, such as deferred vested benefit statements and spousal consent election forms, which are regulated by Treasury/IRS. The study required by Section 319 should also encompass and report on the effectiveness of those disclosures and whether they are being received, accessed, understood, and retained. Until we know a lot more about the effectiveness of all the current regulatory requirements applicable to consumer disclosures, attempts to coordinate and harmonize them would not be appropriate.

**Question 24: Further Agency Consideration**

The primary intent of section 319 of SECURE 2.0 was and remains to obtain reliable information upon which the Agencies and the Congress can assess and make recommendations to improve plan and participant disclosures. The number one key to the effectiveness and success of this provision is that it is based on reliable plan and participant data on current disclosure receipt, usage and understanding. The Agencies must base all of their work by first designing and carrying out a neutral best practices review. As previously stated, the Pension Rights Center and numerous consumer, research and educational groups stand ready to assist and support this first critical step.

At all stages of the Agencies analysis, engagement with participant, industry and professional research groups is strongly encouraged. The Agencies need to understand and support priority number one — high quality data with which to make recommendations.

**Conclusion**

Effective disclosures are crucial to participants' understanding of and ability to benefit from their retirement plans. Reliable information on the effectiveness of current disclosures will enable all parties to recognize how these disclosures, and the disclosure scheme as a whole, can be improved. The Pension Rights Center looks forward to the results of the study required by Section 319, and to additional opportunities for input before the study findings and report are compiled for Congress.

We appreciate the opportunity to comment on these important issues.

Sincerely,

Karen D. Friedman
Executive Director