



**ERISA ADVISORY COUNCIL
WORKING GROUP ON STREAMLINING REQUIRED NOTICES
WRITTEN STATEMENT OF MICHEL HADLEY
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My name is Michael Hadley, and I am a partner in the law firm Davis & Harman LLP, here in Washington, DC. It's my pleasure to testify before the Council once again. The last time I was here was in 2012 (in that case to talk about lifetime income) and I'm very happy to be back to provide my perspective.

Our firm represents a range of financial institutions, other large corporations (both public and private), trade associations, tax-exempt entities, and advocacy organizations. I personally serve as outside government relations counsel for the SPARK Institute, which represents defined contribution recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms and investment managers. Our firm also represents the American Benefits Council ("ABC"), a Washington D.C.-based employee benefits public policy organization advocating for employers that are dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees, and families. In addition, our firm represents the Committee of Annuity Insurers, which was formed in 1981 to address federal legislative and regulatory issues relevant to the annuity industry and to participate in the development of federal tax and securities policies regarding annuities.

I have testified over the years before government regulators on behalf of all of these groups, but today I am here testifying on my own behalf. My comments today do not necessarily reflect the views of our clients. Nonetheless, the suggestions that I make in this testimony are all based on ideas that I have advocated on behalf of various clients over the years. For example, I will talk in a moment about eliminating the summary annual report, which ABC has publicly advocated. I will also address the need to modernize the mechanism of disclosure to facilitate the use of electronic technologies, an issue that the SPARK Institute and many other clients have supported; I will cite SPARK Institute research on the benefits of allowing plan sponsors to move to a default electronic disclosure system.

Background

Over the years, the number of notices that must be provided to participants and beneficiaries has exploded. When the Employee Retirement Income Security Act ("ERISA") was enacted in 1974, Congress intended that one document – the summary plan description – would be the notice that informed participants of their rights and obligations. Since then, a large number of additional notices have been imposed on retirement plans under ERISA and the Internal Revenue Code ("Code") – now numbering more than 30 that apply just to retirement plans. Many of these notices serve important policy goals, but they are not coordinated, often overlap in the information provided, and are not provided at the same time. In addition, notices that have become redundant or uninformative have not been eliminated.

This state of affairs confuses and overwhelms employees saving for retirement – resulting in them reading less, not more. It also adds unnecessary costs to the plan – costs that participants ultimately bear, reducing retirement readiness. The ERISA Advisory Council recommended in 2009 the creation of a “quick start” guide that would form the basis for a new streamlined disclosure regime that is founded on the concept of progressive access.¹ The time to act on this recommendation is now.

Compounding the problem is the Department of Labor’s (“Department” or “DOL”) outdated rules for electronic delivery of documents. In most contexts, current law imposes significant barriers to making electronic delivery the default method of disclosure. Depending on the nature of the information, any one of four different IRS or DOL standards can apply. In certain contexts, plans can default participants into electronic delivery. But for much information, plans must sign up each participant individually for electronic delivery and obtain affirmative consent. This lack of consistency causes considerable confusion for retirement plans and participants. And as behavioral economics makes clear, inertia is an exceedingly powerful force; the need for affirmative consent creates a considerable barrier for plans trying to increase efficiencies and pass those efficiencies to plan participants.

In my testimony, I will offer a number of suggestions for reform. Some can be done by the Department right now, if it simply has the will to do so. Some may require the Department or the Department of the Treasury to support legislation.

Reform 1: Eliminate the Summary Annual Report for defined contribution plans²

The Summary Annual Report (“SAR”) does not provide useful information. The SAR is intended to be a “summary” of the financial information in a plan’s annual report. It provides generic information about any insurance contracts held under the plan, and information about the total assets held under the plan and that were paid out in benefits. In a defined contribution plan, where the benefits promised always equal the assets held under the plan, the SAR does not provide any information that would be actionable by a participant. Plan sponsors report that the only thing the SAR accomplishes is generating questions from participants about why the disclosure is being provided, what it is supposed to mean to them as participants, and whether the participant needs to do anything with it. Most plan sponsors respond that the participant should just ignore it.

Even if it ever made any sense, the SAR has been overtaken by other, more useful, notices. For defined benefit plans, participants now receive an annual funding notice which provides information about the funded status of the plan. Congress eliminated the SAR for defined benefit plans that provide the annual funding notice. For defined contribution plans, participants now receive much more useful information in the quarterly benefit statement, which

¹ See 2009 ERISA Advisory Council Report on “Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries,” <http://www.dol.gov/ebsa/publications/2009ACreport2.html>.

² For more information on this common sense reform, I recommend reviewing the American Benefit Council’s January 22, 2016 letter to Office of Management and Budget regarding the lack of utility of the Summary Annual Report.

provides details on the financial information for their account, and the annual fee and investment (404a-5) notice.

The quarterly benefit statement informs the participant of his or her total account balance at the beginning and ending of the quarter, the value in each investment in the account, and information about the importance of diversification. In addition, participants in participant-directed plans receive an annual fee and investment (404a-5) disclosure that provides additional information about the fees and performance of each investment available under the plan.

The total assets, total income, and total expenses of a defined contribution plan required in the SAR generally are not helpful to a plan participant because the participant's plan benefit depends on the participant's individual account balance and not on the total income or expenses of the plan. Disclosures should provide useful, personal, and actionable information. The SAR does not. In fact, the disclosure provided by the SAR may make it *more difficult* for participants to determine which disclosures they should look to for useful information about their plan and its benefits.

I strongly believe that the Department of Labor has flexibility to eliminate or streamline the SAR without the need for legislation. Section 104(b)(3) of ERISA provides that the administrator of the plan (other than a plan that must provide the annual funding notice) must furnish to participants and beneficiaries the financial information described in ERISA sections 103(b)(3), (b)(4), and (d)(11) "as is necessary to fairly summarize the latest annual report." This language gives the Department flexibility to require only the information that is actually "necessary" in light of the additional disclosures participants receive and the fact that a plan's annual report is now posted online and fully searchable for any participant interested in reviewing it. And *none* of the financial information currently in the SAR of a defined contribution plan is necessary.

Putting aside the plan's financial information, which is not useful to participants in a defined contribution plan, the SAR does inform a participant that the annual report is available and provides a brief summary of the information in the annual report. In fact, the Department is now posting copies of annual reports on its EFAST website for easy access and review by participants. Informing a participant that he or she can request a copy of the annual report or can access recent annual reports on the Department's website could be done in any number of ways, including a brief annual statement on quarterly benefit statements or in the annual fee and investment disclosure. In addition, the SAR informs non-English language readers in certain plans that assistance is available to them in a common non-English language. This information can be provided as part of other required disclosures.

Accordingly, the Department should amend the SAR regulation to provide that the SAR obligation in a defined contribution plan can be satisfied by informing a participant, at least once a year, of the participant's right to receive a copy of the full annual report and how to obtain a copy, and of the participant's right to receive assistance in a non-English language.

Reform 2: Support legislation to eliminate other unnecessary notices

There are a few other participant notices that are simply outdated and unnecessary. These notices may need to be eliminated through legislation.

- *Pension benefit report* (ERISA § 209). This section requires a plan administrator to furnish a report to employees sufficient to determine their benefits. This notice is redundant because of the pension benefit statement requirement under ERISA section 105, which requires benefit statements either on a periodic basis or upon request.
- *Deferred vested pension statement* (Code § 6057(e)). This section requires plan administrators to provide participants who have separated from service with a statement of deferred vested benefits. In practice, this is now duplicated by the pension benefit statement requirement under ERISA section 105.
- *Notice of determination letter application*. (Code § 7476(b)(2); Treas. Reg. § 1.7476-1; Treas. Reg. § 601.201(o)(3)(xiv)). When a plan files for a favorable determination letter regarding its tax-qualified status, the plan must provide a notice regarding the application. It is extremely rare that the IRS does not issue a favorable determination. In fact, with the coming elimination of the determination program for plan amendments of individually designed plans, this notice will only apply to new plans. This notice is borderline unintelligible for the average participant, who would not object to the plan being determined to be tax-qualified. While outside the purview of the Department of Labor, we recommend Labor work with the Secretary of the Treasury to amend the regulations under Code section 7476 so that employees of the employer are not considered interested parties, except in the case of a plan termination. Other interested parties, such as employer organizations (unions), should continue to be interested parties.

Reform 3: Consolidate all notices provided at enrollment and annually into a single “Quick Start” notice

The Council has heard testimony for years about the sheer number of notices that participants and beneficiaries receive. In this section, I want to focus on those notices provided in a typical defined contribution retirement plan at enrollment and annually. None of these are event-driven: They are intended to provide information to allow the participant to understand the plan and the choices available. Without much effort, I came up with almost a dozen such notices:

1. Qualified default investment alternative notice (ERISA § 404(c)(5)(B) and DOL Reg. § 2550.404c-5(d))
2. Notice of availability of cash or deferred election (Treas. Reg. § 1.401(k)-1(e)(2))
3. Participant fee and investment disclosure (DOL Reg. § 2550.404a-5)
4. Safe harbor notice (Code § 401(k)(12)(D) and Treas. Reg. § 1.401(k)-3(d))
5. ERISA automatic contribution arrangement notice (ERISA § 512(d)(3))
6. Eligible automatic contribution arrangement notice (Code § 414(w)(4) and Treas. Reg. § 1.414(w)-1(b)(3))

7. Qualified automatic contribution arrangement notice (Code § 401(k)(13)(E) and Treas. Reg. § 1.401(k)-3(k)(4))
8. Automatic enrollment under eligible combined defined benefit and defined contribution notice (Code § 414(x)(5)(B))
9. ERISA notice regarding availability of investment advice (ERISA § 408(g)(6) and DOL Reg. § 2550.408g-1(b)(7))
10. Code notice regarding availability of investment advice (Code § 4975(f)(8)(F))
11. Proposed regulations regarding target date funds (75 Fed. Reg. 73987 (Nov. 30, 2010))

Each one of these notices was in response to a particular policy goal, but neither the Department nor Congress has ever asked whether they fit together and which notices are key. When ERISA was enacted, the summary plan description was intended as an integrated disclosure with the key plan features.

Although the project is ambitious, it is time for the Department to consolidate these notices into a single, streamlined document explaining to eligible employees in a defined contribution plan the key features of the plan that a participant might want to know to make the initial decision to enroll and choose investments, including what happens if the participant takes no action. The same information would be provided annually thereafter to participants to refresh their understanding of the plan's key features and investment options.

Under this proposal, which dovetails with the Council's prior recommendations, the Code and ERISA would be amended to create one notice provided to participants, which would be like a "Quick Start" guide to the plan. Anyone who has ever bought any electronics knows exactly what I mean. Consumer electronics typically come with a detailed manual and a "Quick Start" guide that provides all the key information the consumer needs to start using the product. The "Quick Start" notice should be written in a manner calculated to be understood by the average participant.

This "Quick Start" guide would contain the following information. Throughout this list, I have marked with an asterisk any information that should be considered to be removed as not necessary for a "Quick Start" guide because it typically is not needed to make a decision to participate in the plan or make investment decisions.

For all defined contribution plans:

- An explanation of how the participant makes an election to enroll in the plan and to make contributions (including cash or deferred contributions), any administrative requirements that apply to such an election, and the periods under the plan for making elections
- Any matching, non-elective, or other employer contributions that will be made under the plan (including the potential for discretionary contributions) and the conditions under which contributions are made
- An explanation of withdrawal and vesting rules that apply to the contributions under the plan

- Information on how the participant can obtain more information about the plan, including a copy of the summary plan description or similar plan summary and a copy of the most recent annual report (Form 5500)

For defined contribution plans that allow participants and beneficiaries to direct the investment of their account:

- An explanation of the circumstances under which participants and beneficiaries may give investment instructions
- An explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfer to or from a designated investment alternative
- A description of or reference to plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights*
- An identification of any investment managers designated by a plan fiduciary and made available to participants and beneficiaries to manage all or a portion of the assets held in, or contributed to, their individual accounts
- A description of any brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan
- An explanation of any fees and expenses that may be charged against the individual account of the participant or beneficiary that are not reflected in the total annual operating expenses of any designated investment alternative, including for plan features or services the participant or beneficiary may utilize
- An identification of any designated investment alternatives offered under the plan
- For each designated investment alternative and annuity option, the information currently required by Department of Labor (404a-5) regulations, including its fees and expenses, and historical performance information compared against a benchmark
- For each designated investment alternative and annuity option, how to obtain more detailed information described in Department of Labor regulations regarding the designated investment alternative and annuity option upon request

For defined contribution plans that provide for automatic enrollment or use a default investment alternative:

- The level of contributions that will be made on the employee's behalf if the employee does not make another election
- The employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf (or to elect to have contributions made in a different amount or percentage)
- The employee's rights to make a permissible withdrawal of contributions made under the automatic enrollment arrangement, if applicable, and the procedures to elect such a withdrawal
- A description of the circumstances under which assets may be invested on behalf of the participant or beneficiary in a default investment alternative and identification of the default investment alternative

- A description of the right of the participants and beneficiaries to direct the investment of those assets to any other investment alternative under the plan
- In the case of a target date fund, any additional information required by the Department of Labor in final regulations^{3*}

Finally, in the case of a plan that offers access to an eligible investment advice arrangement described in ERISA section 408(g)(2) or Code section 4975(f)(8)(B), the notice could contain key information required by those sections.⁴

Reform 4: Harmonize and streamline timing requirements

All of the notices that I mentioned above are generally required when an employee first becomes eligible to participate in the plan, and annually thereafter. The precise timing requirements, however, differ among these notices. Some annual notices are based on a narrow period before the beginning of a plan year, others are not. These uncoordinated timing rules can cause odd results, the most significant of which is that notices cannot be consolidated. In fact, the Department of Labor recently had to provide relief from the timing rules of the new participant fee and investment (404a-5) disclosure notice. My suggestions for harmonization of timing are as follows:

- Upon enrollment. The “Quick Start” notice should be provided prior to, but no more than 90 days before, the date that is the earlier of (a) the date that the employee is first eligible to make elective contributions under the plan or will have contributions made on the employee’s behalf under an automatic contribution arrangement or (b) the date that an employee can first direct the investments in his or her account. (Special rules should apply in the case of a plan with immediate eligibility, which cannot make the disclosure in advance and should be required instead to make the disclosure as soon as administratively practicable.) In the case of a plan that does not provide for employee or cash or deferred contributions and is not participant-directed, the “Quick

³ There are *proposed* regulations regarding target date fund disclosure, which the Department of Labor has not finalized. See 75 Fed. Reg. 73987 (Nov. 30, 2010). DOL’s proposal would add new disclosures to both the participant fee and investment notice and the QDIA notice. In general, I do not believe any additional disclosures are required, but if they are ultimately added, they should be properly integrated.

⁴ Such a notice might include: (a) Identification of the fiduciary adviser and the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser; (b) The role of any party that has a material affiliation or contractual relationship with the fiduciary adviser in the development of the investment advice program and in the selection of investment options available under the plan; (c) All fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property; (d) Any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property; (e) The manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed; and (f) Notice that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property.

Start” notice should be provided at the same time it is provided annually to any current participant.

- Annually. The “Quick Start” notice should also be provided to participants at least annually, but as the Department found with the participant investment and fee (404a-5) disclosure, a twelve-month period rule can create odd results. Accordingly, I suggest that the “Quick Start” notice be provided at least once in any 14-month period, without regard to whether the plan operates on a calendar or fiscal year basis. This will be a flexible standard that will avoid problems under some current law notices.
- Upon request. The “Quick Start” notice should be provided upon request to any eligible employee, participant, beneficiary, or alternate payee.

I have discussed these harmonized timing requirements in connection with the “Quick Start” notice, but a project to harmonize timing of various enrollment/annual notices could be done even if there is no change to the content of them.

Reform 5: Modernize the Rules for Electronic Disclosure

Currently, there are no fewer than four separate regulatory standards governing the circumstances under which an employee can be provided with a retirement plan statement, notice, or disclosure in an electronic format. First, Treasury Regulations permit electronic delivery of notices and disclosures if a participant has the “effective ability to access” electronic media. Second, a DOL Field Assistance Bulletin (“FAB”) allows the “post and push” method, whereby plans can use a continuous access secure website for the posting of pension benefit statements, provided that individuals are notified how to access the website and that they can opt out and receive free paper disclosures instead. Third, non-benefit statement disclosures required under ERISA can be made electronically (a) to a participant who has effective access to the document electronically at work and use of electronic information systems is an integral part of the participant’s duties or (b) to a participant or beneficiary who offers affirmative consent. Fourth, participant investment and fee (404a-5) disclosures can be made electronically under the Department or Treasury regulations, or if the participant voluntarily provides an e-mail address.

In 2011, the Department heard from a wide range of parties about the value of electronic delivery in an age of ever-expanding disclosures. Commenters pointed out in response to the Department’s request for information that allowing plans to make e-delivery the default method for communicating with participants (but allowing participants to opt for paper) will enhance the effectiveness of ERISA communications, maintain security of information, and produce cost savings for plans that decide to opt for e-delivery.⁵

⁵ See, for example, letter from Investment Company Institute in response to RFI (June 9, 2011), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB50/00041.pdf>.

In 2015, the SPARK Institute commissioned an independent and comprehensive white paper by respected research organization Quantria Strategies, LLC which examined the rationales for allowing plan sponsors to make electronic delivery the default method for communicating with retirement plan participants.⁶ The white paper calculates that switching to an electronic delivery default would produce \$200 to \$500 million in aggregate savings annually that would accrue directly to individual retirement plan participants.

Other findings in the 2015 white paper:

- **Online Access is Becoming Nearly Universal.** Surveys indicate that virtually all Americans have access to online services, in the workplace and/or at home. Access is broad across age group, race, household income, and region.
- **Participants are Very Comfortable with Electronic Delivery.** A study by Greenwald & Associates, sponsored by the SPARK Institute, and reported in the SPARK Institute white paper, suggest that a large majority (83%) find it acceptable to receive information online if they have the option to return to paper at no cost.⁷ In fact, a significant majority agree with positions that suggest a willingness to consider online receipt.

Retirement plan disclosures are one of the few places that the law has not caught up with technology. Nearly all Social Security recipients (98.6 percent in 2014) receive their benefits through electronic payment, and 85 percent of the 137 million income tax returns filed as of May 16, 2014 were filed electronically. Employees of the Department of Labor are quite familiar with a default to electronic disclosure. The vast majority of disclosures provided by the Thrift Savings Plan (“TSP”), the federal government’s own 401(k) plan, are now electronic by default, one of the reasons for the low cost structure. (When the TSP switched to default electronic delivery, the opt-out rate was very low – only 10%.⁸) Private employers should be able to take advantage of the same opportunity.

The key, of course, to moving to a default electronic disclosure option is that participants do not lose the right to receive any required documents in paper if they choose and are told that they can switch to paper at any time. Older surveys that purport to suggest that individuals prefer paper disclosure focus on that right being taken away. When the true choice is presented to individuals – that is, a default to electronic disclosure, with paper available at any time at no additional direct cost – survey respondents are increasingly comfortable with default electronic disclosure.

It is, frankly, just a matter of time before the Department updates its rules or Congress changes it for them. We are not going to be having this discussion in 30 years, when today’s

⁶ A copy of the white paper is available at: http://sparkinstitute.org/content-files/improving_outcomes_with_electronic_delivery_of_retirement_plan_documents.pdf.

⁷ The study was conducted from December 3th, 2014 to January 3th, 2015.

⁸ <http://www.frtib.gov/pdf/minutes/MM-2007Feb-Att6.pdf>.

teenagers who have lived their lives online are approaching retirement. And when the Department's rules do catch up, this will make required disclosures much more effective:

- Electronic disclosure allows a **layered** approach where the key information is displayed and more information is available in an interactive matter.
- Effective electronic disclosure can provide needed information to employees in a form that is easily accessible, searchable, and available around the clock.
- Electronic notice is also better than paper for the millions of Americans for whom English is not their primary language, because electronic information can be translated by software almost instantaneously.

Last Congress, the Receiving Electronic Statements to Improve Retiree Earnings (“RETIRE”) Act (H.R. 2656 and S. 3417) was introduced on a bipartisan basis in both the House and Senate. This bill had 29 co-sponsors of all political stripes in the House of Representatives. The reason that the bill attracted support from both sides of the aisle is that it was a balanced approach – modernizing the delivery of retirement plan disclosures with important consumer protections:

- Participants would have the right to request paper at any time, without additional direct charge.
- Participants would receive a short paper notice (such as a postcard) once a year reminding them of any documents being provided electronically.
- Proper notice must be provided when new documents are posted to a website or other internet or electronic-based information repository and this notice must convey the need to take action to access the posted material.
- The confidentiality of personal information must be protected.

These protections are common sense and could be implemented by the Department right now, as part of a move to allow (but not require) a plan sponsor to make electronic delivery the default for required disclosures.

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The ERISA Advisory Council has a unique opportunity to lead the Department of Labor to a 21st century disclosure regime, one that recognizes that disclosure should be actionable and understandable, and not overwhelm. Many of our disclosures, and the rules regarding when and how we deliver them, are simply outdated for the modern defined contribution plan. I very much look forward to the results of the Council's work.