

June 7, 2017

## **Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors**

### **Written Statement of David N. Levine and Brigen L. Winters Principals, Groom Law Group, Chartered**

Our names are David Levine and Brigen Winters and we are Principals at the Groom Law Group, Chartered, an employee benefits specialty firm in Washington, DC.

Thank you for the opportunity to testify before the Council on this important topic. Enhancing the effectiveness of mandated disclosures for retirement plans is of critical importance for both plan participants and sponsors.

Participants need clear, understandable and timely disclosures that provide them with the information they need to make informed retirement decisions. At the same time, the disclosure rules should not impose unnecessary, costly burdens on employers. The Council should recommend changes to the ERISA disclosure rules that strike this balance.

Specifically, the Council should consider ways in which the existing ERISA disclosure requirements can be streamlined to provide participants with useful information in a manner in which they are likely to read and understand it. Too many of the specific disclosures that this year's Council is reviewing are too long and complicated and contain extraneous information that only serves to confuse participants. The ERISA disclosure regime should provide information to participants in a manner they are likely to use and understand it – and not overwhelm them with unnecessary information.

We present our comments in three parts:

- Comments on Specific Notices: Annual Funding Notice (AFN), Summary Annual Report (SAR), Summary Plan Description (SPD), and Summary of Material Modification (SMM)
- Electronic Communication
- Other Resources

#### **A. Specific Notices**

##### **1. Annual Funding Notice**

ERISA section 101(f), as enacted as part of the Pension Protection Act (PPA), requires plan administrators of defined benefit plans covered by the PBGC to provide AFNs to participants, beneficiaries, contributing employers, labor organizations and the PBGC. As expressed in the preamble to the final rule on the AFN, the rule implementing the notice is intended to “enhance[] retirement security and increase[] pension plan transparency by ensuring that workers

receive timely and accurate notification annually of the funded status of their defined benefit pension plans.”

However, the regulations and current model notice provide for a disclosure that is too long and contains extraneous and confusing information. To ensure that employees receive timely and accurate information on their plan’s funded status, the AFN requirements and model notice should be substantially shortened and tightened up in a manner that provides plan participants only with relevant, understandable information.

Notably, the current model notice includes asset values and funding percentages that are based on the actuarial value of assets. There are legitimate policy reasons why the funding requirements are based on asset values that are smoothed over a period of years (i.e. the “actuarial value of assets”), but these reasons do not carry-over to participant disclosures. The notices should simply contain the current market value of assets, which is the most important indicator of the plan’s funded status.

Similarly, the plan’s funding percentage should be simply calculated by taking the fair market value of assets and dividing them by the plan’s liabilities, instead of subtracting the prefunding balance from the assets. Again, while there are legitimate policy reasons why the prefunding balance is subtracted from the assets when determining the minimum funding requirements, these policy reasons have nothing to do with helping participants understand how well funded the plan is.

Also, the model notice calls for a table of beginning of year assets and liabilities for the current plan year, and the two prior plan years. However, later in the model it calls for the disclosure of asset and liability values as of the end of the current plan year. Instead, the initial table should be expanded to show results as of the beginning of the following year so that all funding results are consistent and in one place.

In addition, the asset allocation chart in the model notice should be simplified. The current chart lists 17 categories of assets. Many plans typically categorize investments into a much smaller number of categories, such as stocks (domestic), stocks (international), bonds (perhaps distinguishing between investment grade and high yield), real estate, private equity, alternatives / hedge funds, and cash.

Finally, the discussion of plan terminations and the PBGC in the AFN should be greatly scaled back by at least 50%, with participants being provided a shorter summary of the termination rules and a much shorter summary of the PBGC guarantee rules. Participants should then be directed to the PBGC website for additional information.

## **2. Summary Annual Report**

The SAR also should be streamlined to make it more useful and informative to participants. As currently structured, the SAR is not valuable to participants and the disclosures contained therein are not material to a participant’s understanding of the plan. At a minimum, the SAR should be in table form instead of the narrative, fill in the blanks format used currently. More

fundamentally, it should be revised to provide information on the plan documents and reports that participants can access and how they can access the information.

### **3. Summary Plan Description and Summary of Material Modifications**

The SPD requirements have long been a backbone of participant disclosure. However, as the number of notices has proliferated, the SPD has increasingly become a document that is prepared and distributed as a matter of course but is not widely read or utilized.

Numerous provisions required to be included in SPDs in one form or another – ranging from account fees to the operation of plan automatic enrollment and default investment options – are now supplanted by other, more detailed notices. What results is, at best, a blizzard of participant disclosures, and, at worst, potentially confusing and occasionally apparently contradictory communications. Further complicating this landscape is the need to provide periodic SMMs that may already address changes already integrated into other annual notices – such as in a safe harbor notice.

Notably, the Department and the IRS have worked together in the past to generate a sample automatic enrollment and default investment notice ([https://www.irs.gov/pub/irs-tege/sample\\_notice.pdf](https://www.irs.gov/pub/irs-tege/sample_notice.pdf)) that serves as a great example of how the Department might move forward in enhancing the effectiveness of communications to participants in beneficiaries. To achieve these goals, there are two potential steps the Department might take:

First, given the various timing rules that apply for ERISA-required notices and the Department's prior flexibility in defining how an "annual" participant fee disclosure notice must be provided, the Department might work to allow the integration of annual notices into a single combined SPD-notice document that would address default investments, plan fees, and the various SPD requirements in a single place such that notices would be provided once a year, and not during a series of cascading deadlines. Ideally, a second phase of this process would be to integrate various IRS notices, such as those relating to how amounts may be rolled over from a retirement plan.

Second, while integration of documents to minimize overlap and confusion would be positive, the Department should also recognize that in an era of unbundled services, total harmonization of documents is not always possible to achieve. As such, as an alternative to the annual SPD-notice combination, the SPD requirements should be revisited to harmonize with newer notices such that disclosures of the same fact – such as fees that can be imposed on a participant's account – need only be disclosed in one place. For example, this could include participant fee disclosure notices provided quarterly or annually and the SPD. In an event, the duplication of requirements should be eliminated.

While many other paths could emerge, these first two steps would provide significant progress on enhancing the effectiveness of plan disclosures while also reducing the regulatory requirements and costs that are often passed through to the very accounts of participants and beneficiaries who are receiving confusing communications.

## **B. Electronic Communication**

As pointed out in the 2009 ERISA Advisory Council Report on Promoting Financial Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries, required disclosures have multiplied greatly in the thirty-five years since ERISA was passed, both as a result of the growth of individual account plans and as a result of additional, sometimes overlapping disclosures required by the Internal Revenue Code for qualified plans. At the same time, the advance of modern technologies – in particular the use of the worldwide Internet and individuals’ reliance on email communications – have changed how participants access and review information. Many participants now access their financial information, including their retirement plan information, principally, if not solely, through the Internet.

Like the 2009 Council Report on Promoting Financial Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries, we recommend that the Department allow plan administrators to rely on the IRS rules governing electronic disclosure. We agree with the 2009 Council’s conclusion that the IRS rules will adequately protect the rights of actively employed participants because administrators can easily determine whether participants have a working email address and reasonable access to email communications.

We also believe that the ERISA disclosure regime should take advantage of participants’ reliance on email communications and the Internet by adopting a progressive access regime under which participants are first furnished with simple, fundamental information via email communications. This initial electronic communication of fundamental information should also include instructions on how the participant can access additional plan information. Under such an approach, participants are be provided with the basic information they need along with the tools they can use to drill down to get more detailed information.

## **C. Other Resources**

Similarly, we believe a Summary/Quick Start Guide like that recommended in the 2009 Advisory Council Report on Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries can be a useful tool in progressive access regime that relies on electronic communications. According to that report, a Summary/Quick Start Guide could be used to help participants and beneficiaries get oriented and serve as the basis for a streamlined, electronic-focused disclosure regime that uses progressive access to provide participants with fundamental information tells them how to obtain additional information if and when needed. The 2009 Report likened such a guide to a summary of a new electronic device’s 100-page owner’s manual.

That said, we believe great care would need to be given to ensure that the guide does not exacerbate the already duplicative and overlapping disclosure requirements. In designing such a guide, the Department and/or Congress should try to design such a guide so that it would replace, not be in addition to, other disclosure requirements. For example, the Summary/Quick Start Guide could be designed to replace the SAR, SPD, and other standardized notices.