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**STATEMENT OF THE PENSION ACTION CENTER  
ON MANDATED DISCLOSURES FOR RETIREMENT PLANS –  
ENHANCING EFFECTIVENESS FOR PARTICIPANTS  
AND SPONSORS  
BEFORE THE ERISA ADVISORY COUNCIL  
AUGUST 23, 2017**

Good morning. I am Jeanne Medeiros, the Director of the Pension Action Center of the Gerontology Institute at the University of Massachusetts Boston. The Pension Action Center is home to the New England Pension Assistance Project and the Illinois Pension Assistance Project. These projects have, to date, recovered over \$57 million in pension benefits for residents of New England and Illinois. Our Center is one of six Pension Counseling and Information Projects nationwide, all funded through the U.S. Administration for Community Living. These projects provide free, direct counseling and advocacy to individuals, enabling them to claim the retirement income they have earned. Our Project is the only source of free expert legal advocacy for individuals in the seven states we serve, and our clients are primarily low- and moderate- income workers, retirees, and their families. We help them to secure pension benefits which would otherwise very likely go unpaid.

We applaud the ERISA Advisory Council for focusing on improving the effectiveness of retirement plan disclosures to participants and beneficiaries. Thank you for inviting us to testify.

It goes without saying that the purpose of ERISA's required disclosures is to ensure that workers, retirees and their families can understand their rights and obligations under their retirement plans, to enable them to monitor the overall financial status of their plans, and to enable participants and their families to receive the benefits they are due under these plans.

At the Pension Action Center, we hear from people every day who do not understand basic information about their plan – how do I become vested, how is my benefit calculated, when can I claim my benefit, what are my benefit payment options, under what circumstances could my benefit be suspended or forfeited. We also hear from people who have received disclosure notices from their plan, and are anxious about the meaning of the notices. Many callers do not understand the information which the notice seeks to convey, what they should do with the notice they have received, and whether they should be taking any action based on the notice. In short, plan disclosures, while vital to participants, are often laden with both legal and financial jargon that is confusing and difficult for the average lay person to understand.

I will comment on the specific questions in the Council's questions and respond to the draft documents that have been provided. We want to strongly assert however, on behalf of participants, three over-arching points. The first point we feel we must address is the move toward electronic disclosures, a move which we do not support, as it runs counter to our experiences in day-to-day interactions with our clients.

The second is that that these disclosures should be improved, not streamlined or eliminated. We will comment on the modifications that have been suggested by the Council and others, and offer some additional suggestions.

The third issue I would like to raise is to inform the Advisory Council members of the barriers to full disclosure we see every day in our practice, and to offer suggestions on further improvements which would benefit participants.

### **Electronic delivery**

I have reviewed the testimony of most of the witnesses who have previously appeared before the Council on this topic. It is quite clear that those who represent plan sponsors and financial service firms overwhelmingly express an interest in moving to electronic delivery of these required disclosures. I am quite confident that I can speak for all of the pension advocates in the six Pension Counseling and Information Projects nationally in saying that this would not be in the best interests of the clients we serve.

The threshold issue is: why are these notices mandated, what is their purpose? These are documents intended to inform workers, retirees and their families of information which is vital to their financial security. Discussions of the ostensible

“burden” and “expense” to plan sponsors should have little weight in this discussion. Plan sponsors do not speak for the interests of workers and retirees. The voices of participants and their advocates are often not part of these discussions at all. I would suggest that it is more appropriate to look at the positions taken by the Pension Rights Center and the AARP, which do speak for participants, and which have raised serious concerns about electronic disclosure in their testimony before the Council.

I have reviewed the cases we have closed at the Pension Action Center over the past 2 years, and I found that only about half of our clients gave us an email address at which we could contact them. Over 77% of our clients are over the age of 60, and 49% of them are living on annual incomes of under \$20,000. 67% live on incomes of under \$30,000. Many of them do not have regular access to a computer and are not computer-literate. This is something which those of us who sit in front of computer screens all day might not realize, but it is very real. Access to and familiarity with a computer can often be a function of income, age, and/or job status, and thus, moving to an all-electronic system of disclosure could have a negative impact on our most economically-vulnerable seniors.

As Jane Smith of the Pension Rights Center noted in her testimony on June 7<sup>th</sup> of this year, the method of delivery must ensure receipt by participants and beneficiaries and must not require undue effort or present a hardship to participants, even a few. As Ms. Smith points out, any method of delivery which requires the participant to take additional steps, such as visiting a library or senior center, or asking to use a friend or family member’s computer, or having to make a specific written or verbal request for a required disclosure, is a disservice to these participants. As we noted above, these notices can be vital to a participant’s economic security in retirement, and they must be delivered in a way that guarantees they are received by the participant.

There are many other reasons why delivery of these notices as paper documents is important to participants. First, I would cite here the testimony of Michele Varnhagen of the AARP before this Council on June 6<sup>th</sup> of this year. In her testimony, she referred to numerous studies conducted by the AARP and others in which respondents overwhelmingly stated they preferred paper over electronic disclosures when the information involved their retirement plan. Seventy-five

percent (75%) of all of the respondents preferred paper disclosures, with this percentage rising to eighty-four percent (84%) among those over the age of 50.<sup>1</sup>

The 2012 study also illustrates the reasons why paper disclosures are preferred over electronic. The survey respondents overwhelmingly indicated that they were more likely to read and to save documents delivered on paper. Since the information in these documents can be complicated and difficult to understand, paper documents allow the participant to read and absorb the information at their own pace, or, at a minimum, motivate the participant to at least save the document, for future reference, with their other important papers. As someone who represents participants on a daily basis, I can testify that the client who comes to us with paperwork they have received from the plan over the years is in a much better position, and is far easier to represent, than the participant who has no such documents.

The use of electronic-only disclosure raises another serious issue which I have not seen addressed by any of the prior witnesses, although Michele Varnhagen did touch upon it in her testimony. About 25% of the clients who come to our Center have cases we designate as “lost pensions”. In these cases, the participant left employment with a deferred vested pension payable in the future, in some cases as much as 35 years in the future. However, between the time this participant leaves his or her employment and the time he or she reaches the plan’s retirement age, multiple events may have occurred with the plan sponsor. Divisions may be spun off to different entities, entire companies may be bought and sold numerous times, companies may file for bankruptcy, or shut down entirely. If vital plan documents are only accessible through an employer-maintained website, what happens in these cases? Will plan documents be available? How? Who would be responsible for maintaining an archive of these documents?

**The Pension Action Center firmly believes that the Summary Plan Description and individual benefit statements, the most critical disclosures for workers, retirees, and their families, should only be delivered in paper form by first-class mail, unless the participant affirmatively elects to receive these electronically. For all other disclosures, the Pension Action Center supports the Labor Department’s current rules, which permit electronic disclosure to employees who typically work with the employer’s computer network as part of their regular duties. These rules also allow employers to ask employees if**

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<sup>1</sup> Rebecca Perron, Ph.D., “Paper by Choice: People of all ages prefer to receive retirement plan information on paper”, AARP 2012, [www.aarp.org/research](http://www.aarp.org/research)

**they want to provide an email address and agree to receive documents electronically. Participants should be allowed to opt in to electronic disclosures if they choose. We do not support any rule in which electronic disclosure is the default method, with participants required to opt out to receive paper notices.**

### **Improving disclosures to participants in general**

We concur with the testimony of a number of previous witnesses who suggested that including a heading or cover sheet which would very briefly explain why this notice is being sent, and whether any action is required on the part of the participant, would be very helpful. ABA Retirement Funds, Mercer, and the Pension Rights Center, all testified in support of some brief introduction, such as a heading or callout box, succinctly telling the participant why they are receiving this notice, whether any action is required, and who they can contact at the plan or EBSA if they have further questions.

The Pension Rights Center suggested that the Employee Benefits Security Administration (EBSA) Department could write introductory paragraphs for each required notice in language understandable to the average participant. We are sure that their Benefits Advisors must explain the significance of various notices to participants on a regular basis, and this experience in translating technical information into understandable terms should be invaluable in writing these brief introductions.

Model notices and standardized language are generally very helpful to participants, and we support their use. When a participant sees the same type of notice and language over the course of different years and possibly from different employers, it enables the participant to become familiar with the notice and the type of information conveyed. I am sure that well-written model notices would be welcomed by plan sponsors as well as by participants and their advocates, and we would recommend that plans be required to use the model language drafted by EBSA.

I will now focus on the draft documents that were provided to me along with the Advisory Council's letter of July 28<sup>th</sup>, 2017.

## Quick Reference Guide to the Summary Plan Description

**We are firmly opposed to the recommendation to eliminate the requirement that plans automatically send out the SPD every five (or 10 years). As I have stated several times today, this information is vital to participants, and the mailing costs to the plan sponsor are negligible when weighed against the ability of workers, retirees and their families to know their rights and secure their futures.**

Summary plan descriptions (SPDs) and individual benefit statements are the most important disclosures for participants. They provide the basic information most participants need to understand their plan and benefit entitlements.

As stated in my previous comments, we do not support electronic delivery of the Summary Plan Description, precisely because it is such an important document for participants, and it is far less likely to be read and kept if it is delivered only in an electronic format. The “Quick Reference Guide” pre-supposes electronic delivery only, and requires the participant to take additional steps to even obtain the complete Summary Plan Description.

The ERISA Advisory Council’s suggestion of a ‘Quick Reference Guide’ could be helpful to participants who have elected to receive electronic disclosures. It is basically an expanded table of contents which could direct the user to the appropriate section of the complete SPD.

In truth, in our practice, we often find that the Summary Plan Description lacks the level of detail we need to fully understand essential features of the plan. We do not feel that further simplification of the SPD is advisable, nor would it be truly helpful to the participants and their advocates.

We do believe it would be very helpful to participants if a hard copy of the complete Summary Plan Description were provided, along with a general introductory paragraph explaining that it is a very important document which explains how the retirement plan works, how a person becomes eligible for benefits, and many other important facts, and that it should be retained indefinitely.

We were very pleased to see in a prominent place in the “Quick Reference Guide” valuable information which is usually buried at the back of the Summary Plan Description, or sometimes completely absent from the SPD. Most importantly, the

statement of ERISA rights, information about the name of the plan, the plan year, the plan administrator, method for filing a claim, and information about EBSA , should be required at the beginning of every SPD.

### Annual Funding Notice

The sample AFN drafted by the Advisory Council incorporates some of the suggestions offered by previous witnesses, and seconded in my previous testimony. The introductory paragraph is particularly helpful, and seems to us to strike the balance between simplification and accuracy in a very helpful way.

### Summary Annual Report Proposal

We concur with the proposal to notify participants that the Form 5500 has been filed and how they can obtain it.

### **Suggestions for further improvements**

With the Council's indulgence, I would like to make a few brief comments about the barriers to full disclosure we see every day in our practice, and to offer suggestions on further improvements which would benefit participants.

At some point in most of our cases, we make a written request to the plan administrator for a Summary Plan Description and for information about our client's benefit status, specifically about his or her benefit credit, vesting credit, benefit amount and calculation. We believe that a participant is entitled to this information pursuant to Sections 104(b) (4) and 105(a) of ERISA. In requesting this information, we always include a Release form signed by the client authorizing that the information be provided to us.

While many plans are responsive to our requests, we also experience many instances in which the plan's response is that the requested information will not be provided without a Power of Attorney, or even a subpoena. We rely on guidance issued by the Department of Labor in an Advisory Opinion issued in 1979 which states that "it is the view of the Department of Labor that if information is to be provided to a participant under sections 104(b) (4) and 105(a) of ERISA, the information must be furnished to a third party where ... the participant has authorized in writing the release of the information to such third party." See U.S. Department of Labor Advisory Opinion 79-82A.

Although we cite this Advisory Opinion, we still have difficulty with a number of plans . Some plans continue to refuse providing us with the information which the client is clearly entitled to and which we need to effectively assist them.

We would welcome some stronger guidance from the Department in this area, so that plans will have a better understanding of their disclosure responsibilities, and so that workers, retirees, and their families can get the legal assistance they need. A participant has the right to the assistance of counsel in reviewing these plan documents, and plans should not create unreasonable barriers to this assistance.

Another issue which comes up repeatedly concerns the plan's obligation to provide the SPD. When we request information on behalf of a client, we specifically request the SPD that was in effect when the participant left employment. However, plans sometimes take the position that ERISA Section 104 mandates only that the most recent SPD be provided. Unfortunately, some plans rely on a very narrow reading of Section 104, which refers only to "the latest updated summary plan description".

There is a small body of helpful case law holding that participants are entitled to all of the documents which are critical to evaluating their rights, including the SPD in effect when they left employment. However, it is frustrating to us as practitioners and an inefficient use of our time to have to argue with an uncooperative plan administrator about a common-sense point that could and should be clarified by the Department of Labor.

### **Concluding Comments**

Thank you for giving me the opportunity to share my perspective as a participant's advocate with you today.

I will be pleased to answer any questions you may have.