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Written Statement of AARP
before the ERISA Advisory Council

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On

Mandated Disclosure for Retirement Plans Enhancing Effectiveness for Participants and Sponsors

Before The U.S. Department Of Labor 2017 Advisory Council On Employee Welfare

And

Pension Benefit Plans

June 6, 2017

On behalf of AARP, please accept these comments on Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors. AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families with a focus on health security, financial stability and personal fulfillment.

AARP welcomes working with the Council and interested parties to review the consumer disclosures required under the Employee Retirement Income Security Act (ERISA) and consider which are still relevant, may be terminated, combined with other documents, or improved.

The Purpose of ERISA's Disclosure Requirements

ERISA was enacted to provide a minimum set of consumer protections to workers, retirees and their families after several large unfunded pension plans collapsed during economic recessions in the 1960's. Tens of thousands of workers and their families lost the pensions they had been promised and earned because there were no federal legal standards for funding and protecting the promises made by employers.

ERISA (Title I) established 5 key protections for participants and their families that apply to retirement plans and to a lesser extent to other types of employee benefit plans:

1) Disclosure;
2) Participation and Vesting;
3) Funding;
4) Fiduciary Responsibility; and
5) Department of Labor and judicial redress.

Key Disclosures – Defined Benefit and Defined Contribution Plans

The purpose of the required disclosures under Title I is to increase transparency and ~~to~~ ensure that participants and beneficiaries know where they stand in relationship to the plan as well as to help participants to police the plan. The main required disclosures under Title I are:

- Summary Plan Description (SPD) – to participants and beneficiaries when become eligible for the plan and every 5-10 years depending on changes made
- Annual Financial Report (known as Form 5500) – to Department of Labor (DOL)
- Summary Annual Report (SAR) – DB plans
- Annual Funding Notice – DB plans
- Benefit Statement – annual for DB plans, quarterly for DC plans (annual if participant does not control assets)

- Section 404(c) Fee Disclosures – by regulation, to participants and beneficiaries

In addition, should specified events occur, the following one time notices must be provided:

- Summary of Material Modifications (SMM)
- Notice of Black-out Period – DC plans
- QDIA Alternative Investment Notice – DC plans
- Automatic Contribution Notice – DC plans
- Notice of Right to Divest out of Employer Stock – DC plans
- Notice of Failure to Meet Minimum funding – DB plans
- Notice of Benefit Determination – DB plans
- Suspension of Benefits Notice – DB plans
- Transfer of Excess Assets to Retiree Health Benefits – DB plans
- Significant Reduction of Future Benefit Accruals – DB plans
- Qualified Divorce Relations Order (QDRO) Notices – DB and DC plans
- Notarized Spousal Consent – DB and DC plans

In addition, every plan has an underlying plan trust document and related plan materials that participants and beneficiaries may receive upon written request.

With respect to the key required disclosures, AARP strongly believes that the underlying plan trust legal document, the summary of the plan, financial report (Form 5500), benefit statements and fee and investment performance disclosures are critical and essential documents provided to participants and must not be eliminated or combined. These documents are fundamental to workers' and their families' understanding how the plan works, where they stand under the plan and how to monitor and protect their earned benefits. The summary plan description (SPD) is generally the primary way that participants know how the plan works. Without delivery of the SPD, workers would not know when they are eligible, when they are vested, when they may claim benefits, how to claim benefits, and a myriad of other rules and requirements.

The Summary of Material Modifications (SMM) is an occasional document in the retirement space, but, if the terms of the plan are amended, it is the only way that participants are informed of a change in the plan. Similarly, the benefit statement is the primary way consumers know specifically how much they have earned under the plan, how much they can expect to have when they reach retirement age, and if there are any special conditions or limitations on the benefits they have or will earn.

Finally, in 401(k) and similar plans, since workers usually are responsible for their investment decisions, it is essential that they have up-to-date information on their investment options. All experts agree that the most critical factor in determining the amount with which the participant retires is the fees charged on their investments.

Investment experts as well as behavioral scientists largely agree that retirement savers should only have a curated manageable list of investment choices. As the research has become clearer and more widely publicized, 401(k) plans have been paring down participant investment choices in recent years. The more that 401(k) plans narrow available prudent investment options, the shorter and more understandable will the plan fee and investment performance disclosure be. For example, the Federal Employee Thrift Savings Plan (TSP) has provided a useful internationally applauded model. It is a highly successful 401(k) type plan with a limited menu of clear and differentiated investment choices and a target date fund.

The Council has specifically asked several questions about the degree to which these documents are understandable to consumers and written in plain language. Our experience is that the documents are as understandable as the plan wants them to be. Some plans do a great job of providing clear and concise disclosures, and others do not. However, many disclosures contain legalese and terminology that is not clear to typical participants and beneficiaries, mainly as a way to mitigate litigation risk. AARP has long supported DOL providing sample language to plans to enable them to use well-defined and understood terms.

The Council also asked if there should be more summary disclosures and clarity about when action is required. AARP believes it would be a great help to participants and beneficiaries to encourage use of bolding and headings, and other typesets and language that highlight when participants need to take action. AARP also supports summaries of long documents, and for years has urged DOL to finalize its proposal requiring a summary fee disclosure. It also is critical that documents be timely provided. The SMM may be sent up to 210 days after the plan year of the change, a period far too long to be helpful to most consumers. AARP's accompanying health plan disclosure statement contains additional notice delivery recommendations that apply to all types of employee benefit plans.

To the extent that the trust and plan summary are lengthy documents, it is mainly because lawyers add many caveats and contingencies to protect the employer and plan. AARP would be happy to work with the Department, Council and others to walk through typical documents to discuss if simplifications and improvements are possible. Almost all pension plans and financial service firms are represented by a handful of law firms and consultants who have template disclosures that they use for their clients. DOL and Treasury often issue model disclosures, which are extremely helpful to the plans and participants in making it easy for all parties to write and read disclosures.

The Summary Annual Report (SARs), according to ERISA §103(b), shall include a statement providing a snapshot of the plan's financial status. Congress enacted the SAR requirement for two reasons. The first was that Congress believed that the SAR provided some basic transparency concerning a plan's finances. The second reason was that this basic information would provide participants with enough information to determine whether additional review or inquiries were necessary. Congress realized that the Department of Labor would not be able to police every plan and thus provided participants with adequate information to police their own plans. AARP believes that the appropriate question before the Council is not whether to eliminate the SAR but how to turn it into the document it was supposed to be — a snapshot of a plan's financial health that is helpful to participants. AARP suggests that the Council make recommendations to make the SAR more useful to participants and the Department. The focus should be on a snapshot of financial information that is important for participants to know about their plan so they can police it. Moreover, the SAR is the main document that notifies participants of the availability of the full plan financial report which is filed solely with DOL, Pension Benefit Guaranty Corporation (PBGC) and Treasury. AARP would be willing to consider another document which could alert participants to the availability of the full financial analysis of the plan. The most likely documents would be the annual funding notice for DB plans and the benefit statements for both DB and DC plans. We would not recommend that it be added to the fee disclosures, since those already tend to be somewhat lengthy and consumers may be less likely to see the financial report notice. In contrast, the defined benefit Annual Funding Notice is very concise and usually provides clear information on the funding level of the plan.

The SAR provides transparency to a plan's financial condition. Without such transparency, AARP is concerned that a retirement plan could end up with insufficient assets to pay retirement benefits.

The circumstance that specific notices are provided occur only if the specific event has actually happened. Notably, if the employer has changed or reduced the benefits provided under the plan, the plan must notify the participant and beneficiary of such. AARP urges no change to the correct policy goal that participants know in a timely manner if their benefits are being changed. The other main type of circumstance requiring specific notice relates to cases of death or divorce of the participant. Again, these are important events in which it is necessary to ensure that all rights are protected. AARP also urges the Council to separately consider how any changes could affect spouses, former spouses, widows or widowers, and children. Policymakers should consider what information these beneficiaries may need and the methods most effective to make sure they are in fact informed and able to protect their rights and receive any benefits to which they are entitled.

<u>Industry Desire to Disclose Electronically</u>

AARP also would like to address the desire by some employers and those in the financial services industry to change current law to allow them to transmit more or all disclosure documents electronically. First and foremost, since these are consumer documents, DOL and the Council should first ask plan participants how they would like to receive their pension and other employee benefit plan information. Employers and financial service firms do not speak for consumers, nor do they always share the same goals. In particular, AARP and others have conducted numerous surveys of consumers, (attached), and 75% of all respondents preferred paper over electronic disclosures (84% among those 50+ and 66% among those under 50). Respondents overwhelmingly also stated that they are more likely to read and save paper documents.

AARP would be pleased to work with the Council and others on conducting additional surveys and forums with consumers to gauge their disclosure needs and preferences.

It is important to remember that participants may already share the cost of disclosure. Under ERISA, these costs may be a plan expense. Unless employers and financial service firms propose to transfer all savings from electronic disclosure to participants, savings will more likely go to increase the level of financial services provided or reduce employer payments.

Of course, if workers choose to receive documents electronically, AARP fully supports such delivery. Under current DOL rules, if employees typically work with computers, employers and plans may already automatically provide documents electronically. In addition, employers may always ask employees if they want to provide an email address and agree to receive documents electronically.

As electronic disclosure become more prevalent, it is critical to consider and establish the consumer protections needed in an electronic delivery system. It is the job of the DOL, the Council and others to ensure proper disclosure that meets the goals of ERISA. DOL should work with the industry, employers and consumers to make sure those protections are fair and feasible.
AARP is happy to work with all parties to develop a fair set of needed consumer protections for electronic disclosure. At a minimum:

1) The plan or employer should initially -- when a participant becomes eligible for the plan or if already in the plan -- at least one time, ask the participant how they would like to receive information, and if the participant elects electronic delivery, ask for an email address;
2) For an electronic system, all information should be maintained in one place, where participants can easily find all plan documents, including the plan trust documents;
3) If the plan has a process by which participants must create a username and password to read the documents, then the plan should clearly explain how to create the identifiers;
4) The plan should maintain cyber protection tools to prevent hacking and any losses of information; and
5) The plan should retain documents as long as participants and beneficiaries may need them.

If the Department and Council decide to consider further encouraging electronic disclosure, AARP urges the parties to work through all of the important key issues. For example, if all documents are held on a website, then it will be reasonable for participants to believe that all the documents will always be archived on the website. Workers may join a firm at age 18 or so and may not retire until around age 70, a period of about 50 years. What happens if the employer shuts down its business? What happens if the company is bought by another company? AARP believes that if a plan is going to take responsibility for encouraging workers to obtain plan documents on a website, then the employer should be responsible for transferring all documents to another party if it no longer wants or can maintain the documents. AARP would also recommend that all documents be transferred to the DOL or PBGC, since as long-term interested government entities, they are more likely to be an available and known source of information.

There are a handful of additional issues that the Council and others should consider. Should there be rules about sending and reading documents during working hours? Should there be rules on printing documents on employer property? Should there be rules on using email addresses as opposed to cell phone text messages? Many people may only have a cell phone. It does not seem advisable to encourage or require consumers to read important financial information on a small cell phone. The Council also should consider special rules for rural areas or areas where internet access is limited, weak or not consistent.

In conclusion, AARP is happy to be part of any discussions of the best system for delivering needed information to over 100 million workers, retirees, and their families. For further information or assistance, please contact Michele Varnhagen, Senior Legislative Representative.