May 21, 2024

Submitted electronically via www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
Room N–5655
200 Constitution Avenue NW
Washington, DC 20210

RE: Request for Information on SECURE 2.0 Section 319, Effectiveness of Reporting and Disclosure Requirements (RIN 1210-AC09, 1212-AB58, 1545-BQ98)

Dear Sir or Madam:

The American Benefits Council ("the Council") appreciates the opportunity to comment on the Request for Information (RFI) jointly issued by the Internal Revenue Service (IRS), the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) and the Pension Benefit Guaranty Corporation (PBGC) (collectively, the "agencies"), which solicits input from stakeholders in response to Section 319 of the SECURE 2.0 Act of 2022. Section 319 requires the U.S. Treasury Department, DOL and PBGC to review the reporting and disclosure requirements under ERISA and the Internal Revenue Code ("Code") and make recommendations to Congress in the form of a report on how to "consolidate, simplify, standardize and improve" such requirements.

The Council appreciates that the agencies are soliciting input from stakeholders as they consider what, if any, modifications should be made to the existing reporting and disclosure requirements for retirement plans. As further discussed below, the Council believes that the disclosure requirements imposed by ERISA and the Code should strike an appropriate balance between ensuring that plan participants have access to important information about their retirement accounts, without overwhelming them with unmanageable amounts of information or creating unnecessary administrative burdens and costs for plan sponsors.

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As set forth below, our comments on the agencies' RFI focus on three areas. First, the Council supports the overall consolidation and reduction of disclosures that must be delivered to plan participants. Second, the Council supports the continued and expanded use of electronic delivery as a means to increase participants' understanding of disclosures and to lower costs. Third, we are concerned about litigation risks to plan sponsors in connection with the RFI's questions seeking input on the need to collect more plan information in support of activities that are conducted by parties other than the agencies, plan sponsors and participants. In many respects, the Council's comments in response to this current RFI are consistent with the comments that we have previously filed in response to multiple DOL RFIs on the same topic and multiple studies conducted by the ERISA Advisory Council.[1]

The Council is a Washington, D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

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[1] *See, e.g.*, the Council's comments on DOL's April 2011 RFI Regarding Electronic Disclosure by Employee Benefit Plans, *available at* https://www.regulations.gov/comment/EBSA-2011-0006-0077; DOL's October 2019 Proposed Rule and RFI on Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, *available at* https://www.regulations.gov/comment/EBSA-2019-0005-0227; and DOL's August 2023 RFI on SECURE 2.0 Reporting and Disclosure, *available at* https://www.regulations.gov/comment/EBSA-2023-0011-0018. *See also* the Council's testimony at prior ERISA Advisory Council meetings, including in 2009 on "Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries," *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2009-promoting-retirement-literacy-and-security-by-streamlining-disclosures-to-participants-and-beneficiaries; in 2013 on "Successful Plan Communications for Various Population Segments," *available at* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2013-successful-plan-communications-for-various-population-segments-hess-06-06.pdf; in 2015 on "Model Notices and Disclosures for Pension Risk Transfers," *available at* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2015-model-notices-and-disclosures-for-pension-risk-transfers-rosenthal-05-28.pdf; and in 2017 on "Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors" and "Reducing the Burden and Increasing the Effectiveness of Mandated Disclosures with Respect to Employment-Based Health Benefit Plans in the Private Sector," *available at* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2017-reducing-the-burden-and-increasing-the-effectiveness-of-mandated-disclosures-kritz-written-statement-08-22.pdf.

I. CONSOLIDATE AND REDUCE DISCLOSURES TO PLAN PARTICIPANTS

Consolidate and reduce disclosures.

The RFI asks several questions pertaining to factors which may affect participants' and beneficiaries' comprehension of the information in the disclosures they receive. The RFI asks, for example, if there are concerns regarding the number of notices and disclosures received by participants and the extent to which these concerns could be mitigated by combining multiple disclosures into a single mailing or delivery, or by consolidating information that currently must be furnished in multiple disclosures into a single disclosure.[2] The RFI also asks for commenters' views on whether and how the length of disclosures, and the complexity of the information disclosed, may impact individuals' understanding of the disclosures.[3] Furthermore, the RFI asks about the costs that disclosures create for retirement plans.[4]

The Council supports the overall consolidation and reduction of the information that must currently be provided to participants through various notices and disclosures. As we have previously expressed, including as part of our comments on DOL's 2023 RFI on SECURE 2.0 Reporting and Disclosure,[5] we have found that participants are often overwhelmed by the sheer volume and number of plan-related notices and disclosures they receive, especially when considering that employees receive these disclosures from their employers in addition to other health and benefits-related information. While each required disclosure, when viewed in isolation, may be helpful, when viewed together, all of the required notices and disclosures overload participants. In this regard, we are concerned that a seemingly constant stream of information throughout the year makes some participants less likely to engage with relevant notices and disclosures, contrary to their purpose, because they are overwhelmed or fatigued.

The Council believes that, to combat this disclosure fatigue, policymakers should take steps to consolidate and reduce the overall volume of disclosures that are regularly sent to plan participants. An optimal disclosure regime would emphasize and focus participants' attention on the information that is most relevant to the plan rights and features that they can control and use to implement their individual goals and preferences. While additional plan information should also be available upon request and participants should be appropriately informed on how to access additional information, the goal of participant disclosures should not be to communicate every conceivable piece of information that relates to the subject of the disclosure. Rather, it

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[2] RFI Question #1.

[3] RFI Question #4.

[4] RFI Question #13.

[5] 88 Fed. Reg. 54,511 (Aug. 11, 2023). The Council's comments are available at https://www.regulations.gov/comment/EBSA-2023-0011-0018 (filed on October 10, 2023).

should be to focus participants on the information that is most relevant to decisions that are within their control and give them the ability to access additional information upon request.

As the Council has expressed in the past, one way to implement such a regime would be through the creation of a "Quick Start" notice that is provided to participants at enrollment and annually thereafter. The idea would be to shorten and consolidate all of the current disclosures into to a streamlined, well-organized and concise document of no more than a page or two. The Quick Start notice would highlight only the most relevant information for a participant at the time of the disclosure and any additional information would be provided to participants upon request. We encourage the agencies to specifically recommend such a model in their report to Congress, as required by Section 319 of SECURE 2.0.

Not only does the current volume of disclosures overwhelm participants, it also increases the cost and complexity of administering plans. The consolidation and reduction of disclosures would reduce delivery costs and the cost of designing disclosure systems that comply with detailed content and timing requirements. As a result, rather than using resources to deliver notices that are often ignored, plan sponsors could use these cost savings in a more impactful way – e.g., by providing contributions to participants, or providing additional education and other resources to participants.

Example: Summary Annual Report

As one example of a specific disclosure that we believe should be consolidated into other required disclosures, or eliminated altogether, the Council's members have generally found that the Summary Annual Report (SAR) does not provide any useful information to participants that is not already provided in another required disclosure. Under DOL regulations, a plan administrator is required to annually furnish to each participant a SAR, which provides a summary of the financial information in a plan's annual report, including general information about any insurance contracts held under the plan and information about the total assets that were held under the plan and paid out in benefits.[6]

In a defined contribution plan, where the benefits promised are equal to the assets held under the plan, the SAR does not provide any information that would be actionable by a participant. The Council's members have reported that the SAR only serves to confuse participants, who often ask plan sponsors why they are receiving the disclosure, what it means to them and whether they are required to take any action because of it.

[6] Labor Reg. § 2520.104b-10.

In addition, relevant and important information provided in the SAR already reaches participants via other notices, such as the annual funding notice for defined benefit plans and the quarterly benefit statement and the annual fee and investment notice for defined contributions plans. It would be very feasible to add in information from the SAR that is *not* available in other disclosures – i.e., adding language informing participants that the annual report is available upon request and providing a brief summary of the report – to a different notice or to provide it in a separate, brief statement to participants.[7]

The Council believes that DOL has the authority to streamline or eliminate the SAR. ERISA Section 104(b)(3) provides that the administrator of a plan (other than a plan that must provide the annual funding notice) must furnish to participants the specified information "as is necessary to fairly summarize the latest annual report." Thus, DOL has the flexibility to only require the furnishing of information that is "necessary," taking into account all of the other notices and disclosures participants receive.

II. ELECTRONIC DELIVERY OF DISCLOSURES TO PLAN PARTICIPANTS

Support and expand electronic delivery.

The RFI asks a series of questions relating to the method of delivery for furnishing disclosures to participants and beneficiaries, including the use of electronic delivery.[8] In response to these questions, the Council strongly supports the continued and expanded use of electronic delivery for retirement plan notices and disclosures. Consistent with the goals of Section 319 of SECURE 2.0, we believe that electronic delivery makes disclosures more effective because it improves understanding, accessibility and retention. Moreover, the use of electronic delivery can yield significant cost savings for plans and their participants.

In fact, many Council members report that the most effective delivery of information to participants is through electronic means, specifically by using links and similar tools

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[7] The ERISA Advisory Council recommended the same solution in its November 2017 report on the topic "Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors," *available at* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans.pdf at 9 (recommending that DOL "create an alternative means for compliance with the current requirement to distribute a Summary Annual Report to defined contribution plan participants by allowing plans to notify participants about the availability of the annual Form 5500, including instructions for how to access that filing. The alternative disclosure could be provided as a stand-alone notification, or be included as a part of other mandatory disclosure(s) . . . .").

[8] RFI Question #10.

to improve the organization of disclosures – which makes the volume of disclosure less overwhelming and information more understandable. This helps participants develop a fuller picture of the information they are receiving and allows them to easily access more detailed information if and when desired. This information also typically remains available on the participant's online account so they can return to review it at their convenience. In addition, the electronic delivery of disclosures ensures ease of navigation because electronic documents allow a participant to use their computer's "search" feature to locate specific information.

In contrast, in the Council's experience, paper delivery of disclosures tends not to be as effective because paper disclosures can easily be ignored or lost. Of course, for those participants who prefer paper delivery, paper delivery should always remain available for them.

In addition to the concrete benefits to participants in terms of understanding and engagement, electronic delivery is also critical to lowering the administrative costs that can reduce retirement savings. For example, according to the DOL analysis that accompanied its 2020 electronic delivery rules, DOL expects that its expanded electronic delivery rules will save $349 million per year.[9] These savings have created and will continue to create tangible benefits for plan participants.

It is important to recognize, however, that this is not simply a matter of lower costs and greater accessibility; the use of electronic delivery actually promotes participant engagement with disclosures in a way that encourages actions that are in a participant's own interests – e.g., by directly connecting participants to interfaces that allow them to increase contributions or change contact and beneficiary information that has become outdated.

Do not require access in fact.

As part of the current RFI, the agencies ask questions about the rate at which participants are accessing disclosures and about tools that are available to discern whether participants are accessing disclosures sent to them.[10] While these questions do not expressly refer to the "access in fact" concept suggested in DOL's 2023 RFI on SECURE 2.0 Reporting and Disclosure, they are reminiscent of the concerning questions included in that RFI.[11]

Accordingly, consistent with the comments that the Council submitted in response to DOL's 2023 RFI on SECURE 2.0 Reporting and Disclosure, the Council is reiterating its strong opposition to any changes that would condition DOL's 2002 and 2020 safe

[9] 85 Fed. Reg. 31,884, 31,888 (May 27, 2020).

[10] RFI Question #6.

[11] 88 Fed. Reg. 54,511, 54,515 (Aug. 11, 2023) (RFI Question #21).

harbors on plan sponsors actually verifying that participants accessed a given disclosure. Even when technologically feasible to do so, plan administrators should not be required to monitor participants' website activity any more than they should be required to monitor whether a participant opens their paper mail, let alone reads the contents inside. The Council does not believe that plan sponsors and plan administrators should have any responsibility to monitor participants' website activity or keep track of whether they have accessed certain disclosures, whether online or through paper mail. Plan administrators are required to furnish certain plan information to participants their duty under current law does not go any further. In an ideal world, all individuals would access all legally required documents sent to them electronically or through paper in all areas of life, not just retirement. But we cannot mandate individuals' actions, nor can we impose burdensome costs on employers if we want to maintain a workable and effective voluntary retirement system.

Agency Coordination

One of the most common challenges that our members experience in delivering the notices and disclosures required by ERISA and the Code is the need to comply with two sets of electronic delivery standards – i.e., DOL's standards under Labor Reg. Section 2520.104b-1(c) and Labor Reg. Section 2520.104b-31 and the IRS's standards under Treas. Reg. Section 1.401(a)-21. To eliminate the challenges and uncertainty created by these generally consistent, yet distinct, electronic delivery rules, the Council strongly urges the IRS to confirm through published guidance that documents delivered in accordance with any of DOL's electronic delivery safe harbors will also satisfy the document delivery standards described in Treas. Reg. Section 1.401(a)-21.

III. RISK OF LITIGATION AGAINST PLAN SPONSORS

The RFI asks whether any of the reports that ERISA and the Code require plans to furnish to the agencies "fail to collect information that data users other than the agencies, including the public at large, data aggregators, and ***participant advocates***, would find useful" (emphasis added).[12] The RFI goes on to ask what plan information should be publicly available, and if additional plan information should be available, how might confidentiality, security and other concerns be managed.

The Council is concerned with the framing of these questions as they suggest that the agencies are, as part of their report to Congress, considering recommendations that would expand plan reporting in an effort to support the use of plan data by parties other the agencies, plan sponsors and plan participants. The Council strongly believes that the purpose of plan reporting, which can create significant plan expenses, is to support the needs of the agencies, plan sponsors and plan participants. It is not to

[12] RFI Question #21.

support the use of such data by third parties, which could include, for example, plaintiffs' attorneys mining for their next class action lawsuit or companies looking for insight on which new products and services to market.

For these reasons, the Council strongly opposes any additional information reporting that is intended to or would contribute to additional litigation against plan sponsors. This includes, for example, our opposition to Form 5500 changes that could identify plans as potential litigation targets. The harmful wave of litigation against retirement plan sponsors has operated as a drain on the system and has forced plans into taking defensive measures to avoid potential lawsuits. For example, relevant to the current RFI, we understand that, as plans have attempted to avoid litigation, notices and disclosures have become weighed down with a large volume of complex information that is oftentimes written in legalese, which overwhelms participants and contributes to the "disclosure fatigue" discussed above. This unfortunate outcome is a direct result of increased litigation against plan sponsors. The agencies should be taking actions to limit these harms, not providing the fuel for additional litigation.

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Thank you for considering the Council's comments on the agencies' RFI on reporting and disclosure requirements under Section 319 of SECURE 2.0. If you have any questions or if we can be of further assistance, please contact me at 202-289-6700 or ldudley@abcstaff.org.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy