



VIA Electronic Delivery

May 22, 2024

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

RE: Request for Information: SECURE 2.0 Section 319 – Effectiveness of Reporting and Disclosure Requirements

To Whom It May Concern:

This is the U.S. Chamber of Commerce's response to the Department of the Treasury, the Department of Labor, and the Pension Benefit Guaranty Corporation's (Agencies) Request for Information (RFI) relating to Section 319 of the SECURE 2.0 Act (SECURE 2.0). We believe that the RFI should be a starting point for evaluating the current disclosure regime, and much more in-depth review and research is needed before any changes are suggested or implemented.

Background

Under SECURE 2.0 Section 319, no later than December 29, 2025, the Secretaries of Labor and the Treasury and the Director of the PBGC are required to issue a report (after consultation with participant and employer groups) on the applicable reporting and disclosure requirements and make recommendations to consolidate, simplify, standardize and improve the reporting and disclosure so that participants can better understand the information they need to monitor their plans, plan for retirement and obtain benefits. According to the statute, to assess the effectiveness of reporting and disclosure requirements, the report must include an analysis of how participants and beneficiaries provide preferred contact information, the methods by which plan sponsors and plans furnish disclosures, and the rate at which participants and beneficiaries are receiving, accessing, understanding, and retaining disclosures.¹

¹ It is unclear why Congress asked for the rate at which participants and beneficiaries are receiving, accessing, understanding, and retaining disclosures. First, they are receiving disclosures at the rate required by law or regulations. Secondly, participants are accessing disclosures through whichever medium they are sent. Thirdly, there is little data to show whether participants are understanding disclosures, but given what is there, most do not. Finally, there is no data on how participants are

In response to the directive in Section 319, on January 23, 2024, the Agencies issued an RFI with 24 questions and subparts totaling approximately 110 requests and questions. Our response does not attempt to answer each question or request, but instead it focuses on what information is the most important for participants to receive and how current disclosures may not address this and what are the most impactful ways to reach participants.

Background Statistics

A recent study found that employees only spend 18 minutes each year when they enroll in their benefits, yet they spend over four hours deciding which mobile phone to buy.² Another survey found that almost half (46 percent) of respondents did not know what investments their self-directed retirement accounts were in.³ This likely is because many employees either do not read or do not understand current disclosures. For example, according to a Pew Study with respect to plan fees:

- Nearly 7 in 10 respondents with retirement plans said they were at least somewhat familiar with their plan's fees. However, 31 percent were not at all familiar with the fees.
- Roughly two-thirds had not read any investment fee disclosure in the prior years, and, even among those claiming to be familiar with the fees, 33 percent had not read any fee disclosures in the past year.
- Of the third who had read a fee disclosure, nearly 7 in 10 said they found the information understandable, but only 25 percent of all respondents said they had read *and* understood the fee disclosures.⁴

A 2021 GAO report on the effectiveness of the DOL fee disclosure regulation found that they are, in fact, not effective. Nearly 45 percent of participants cannot use the information in the disclosures to determine the cost of their investment fee, and 41 percent of participants incorrectly believe that they do not pay any 401(k) plan fees.⁵

retaining disclosures. Similarly, there is little to no data on many of the requests in the RFI, which is why our response is more general in nature.

² "On average, employees spend 18 minutes enrolling in benefits" Lisa Burden published May 20, 2019 available at <https://www.hrdiver.com/news/on-average-employees-spend-18-minutes-enrolling-in-benefits/555041/#:~:text=Employees%20spend%20just%2018%20minutes,benefits%20administration%20technology%20firm%20PlanSource.>

³ "46% of 401(k) investors are clueless about their investments, CNBC survey finds. That's not always bad" Greg Iacurci published Sept. 7, 2023 available at <https://www.cnbc.com/2023/09/07/almost-half-of-401k-investors-clueless-about-their-investments-cnbc.html>.

⁴ "Many Workers Have Limited Understanding of Retirement Plan Fees" Nov. 15, 2017 available at <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/11/many-workers-have-limited-understanding-of-retirement-plan-fees>.

⁵ "401(k) Retirement Plans: Many Participants Do Not Understand Fee Information, but DOL Could Take Additional Steps to Help Them" GAO-21-357 published Jul 27, 2021 available at <https://www.gao.gov/products/gao-21-357>. However, many of the GAO recommendations did not

All of these statistics come at a time when between Title I and Title II of Employee Retirement Income Security Act of 1974, as amended (ERISA), there are 27 Title I⁶ retirement disclosures and 27 under Title II.⁷

Employers pay nearly 1/3 of total compensation as employee benefits.⁸ Given this spend, it is imperative that employees actually understand what they are receiving. In addition, employees who understand their benefits are happier and feel more stable. According to a MetLife survey:

- 76% of workers who understand their benefits are happy, and 82% say understanding how to use their benefits would give them a greater sense of overall stability (versus only 47% and 52%, respectively, who do not); and
- 50% say having a better understanding of their benefits would make them more loyal to their employer.⁹

Even though our members spend hundreds of thousands of dollars in complying with the current notice and disclosure requirements, most plan sponsor would agree that they are not effective in communicating actual benefits. Instead, our members look to various media formats, in-person meetings, affinity groups, short, on the go podcasts and touchpoints throughout the year to inform and educate participants on their benefits.¹⁰

Discussion

Before discussing any revision to ERISA's current reporting and disclosure requirements, it is important to understand the purpose of ERISA. "Congress' main purpose in enacting ERISA was 'to ensure that workers receive promised pension benefits upon retirement.' However, Congress also recognized that because employers are not required to offer retirement plans, it is important that employers be able to administer plans with reasonable expense so that they are not discouraged from establishing or continuing such

match up with the findings or with participant overall behavior. For example, GAO recommended providing ticker information for investments. If participants only spend 18 minutes enrolling in their benefits, it is highly unlikely they will actually take time to look up investment information based on the ticker information.

⁶ See "Reporting and Disclosure Guide for Employee Benefit Plans" available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/reporting-and-disclosure-guide-for-employee-benefit-plans.pdf>.

⁷ See "Publication 5411 Retirement Plans Reporting and Disclosure Requirements" available at <https://www.irs.gov/pub/irs-pdf/p5411.pdf>.

⁸ "Employer Costs for Employee Compensation Summary" released Mar. 13, 2024 available at <https://www.bls.gov/news.release/ecec.nr0.htm>.

⁹ "Employees Who Want Happiness and Stability Can't Overlook Benefits: New Study" Sept, 12, 2023 available at <https://www.metlife.com/about-us/newsroom/2023/september/employees-who-want-happiness-and-stability-cant-overlook-benefits/>.

¹⁰ See "Retirement plan communication: reach them where they are" Jan. 12, 2024, Donna Westervelt available at <https://hrexecutive.com/retirement-plan-communication-reach-them-where-they-are/>.

plans.”¹¹ The change in the workforce, benefit design, and technology since 1974 when ERISA was first enacted necessitates an evaluation of ERISA’s notice requirements. However, in doing so, the Agencies and Congress should be mindful of what notices should convey, the cost of providing notices and the cost of changing notice requirements so as not to add to administrative expenses and discourage employers from establishing and maintaining retirement plans.¹²

The types of retirement coverage have changed since ERISA was enacted. In 1974, 401(k) plans did not exist, and, even four years later when they were created, they were not seen as the main source of employer-provided coverage. It was not until the late 1990s that technology actually made self-directed 401(k) plans not only feasible but practical. However, as the type of plan coverage changed, generally neither Congress nor the Agencies reevaluated the notice requirements, but, instead, added more notice requirements. Furthermore, although technology also has evolved, the rules relating to notices have not.

Instead of focusing on each current notice, the Agencies should first look at the big picture of what basic information a person needs with respect to each type of retirement plan and then look at what specific information may be needed based on an event. The Agencies also should keep in mind that for information to be useful, it should be actionable. In determining whether a communication is effective, plan sponsors often look to see whether participants are not only taken action, but whether they are taking the right action.¹³ For example, it would not make sense for someone to receive information on rollovers when the person is first eligible for the plan because there is no actionable item at that time.

For a self-directed 401(k) plan (which is the predominant plan for most participant), the most important information is:

1. How to enroll (and if autoenrolled, how to change or disenroll),
2. How to make an employee contribution,
3. What the matching contribution is, what it means, and how to obtain it,

¹¹“ERISA Disclosure Decisions: A Pyrrhic Victory for Disclosure Advocates” Eugene P. Schulstad available at <https://mckinneylaw.iu.edu/ilr/pdf/vol34p501.pdf>.

¹² “[ERISA’s] ...reporting was seen as a means to provide employees and the government with enough information to know whether the plan was being properly administered with financial integrity. In short, reporting requirements were intended to provide employees with enough information to reveal what benefits will be received, what procedures must be followed, who is responsible for the plan, and whether the plan is adequately funded.” *Id.* at p. 506 (citation omitted). Contrary to what may have been implied in the RFI, the purposes of the reporting and disclosure requirement is not for third parties to be able to aggregate and use reported information to inform academic, industry, participant advocacy or other work. Requiring additional information for this purposes merely adds to administrative expenses that can be passed onto participants.

¹³“Plan Sponsors Need Help Communicating Benefits to Employees” Remy Samuels, Mar. 15, 2023 available at <https://www.planadviser.com/plan-sponsors-need-help-communicating-benefits-employees/>.

4. What is the non-elective contribution, what that means, and how to obtain it,
5. How to invest (or change if automatically enrolled), and
6. How to designate a beneficiary.

There is other information that is needed at the time of an event, but it will not impact all participant all of the time such as divorce, loans, hardship distributions, other distributions, penalties, increasing/decreasing contributions, changing investments, blackouts and rollovers. Although this information is important, providing it to an individual when they first become eligible may overshadow the information that is needed to enroll.

With respect to defined benefit plans, the initial information participants need to know is: when coverage begins, whether there is an employee contribution, the vesting schedule, and the benefit formula. Just in time event are narrower for defined benefit plans, but include divorce, disability, and early retirement benefits.

There currently are a number of notices which do not inform participants of any actions they need to take nor do they provide any information that employees can change. For example, both defined benefit plans and defined contribution plans are required to provide the summary annual report (SAR). With respect to a defined contribution plan, this is particularly unhelpful because the only thing that matters is how much is in the participants account, not the plan as a whole. With respect to a defined benefit plan, the SAR is marginally more informative, but none of the information on the SAR provides an actionable item nor does it include anything that a participant might actually change. Similarly, the Annual Funding Notice is equally unhelpful because, according to DOL's model notice, it "is provided for informational purposes and you are not required to respond in any way."¹⁴ The notice then contains pages and pages of information that the average plan participant has absolutely no understanding of and worse no use for.¹⁵ This is similarly true for many other required notices, such as the Notice of Transfer of Excess Pension Assets to Retiree Health Benefit Account and the Notice of Failure to Meet Minimum Funding Standards.

Many other notices may be relevant, but they are far too long to be meaningful. For example, the current model rollover notice is 19 pages. Although there are many different factors that might possibly impact a small portion of the population, the general rollover notice does not need to contain each and every scenario that might possibly impact someone. Instead, this notice should state what a rollover is, what distribution options generally are available, and general tax consequences. There can then be an embedded link for each and every particular scenario or one link to the longer rollover notice.

¹⁴ "DOL Model Funding Notice" available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB18>.

¹⁵ SECURE 2.0 amended the Annual Funding Notice for Defined Benefit Plans, but it is unclear why and it is especially unclear that these amendments added anything to help any participant in further understanding his or her plan or benefits.

Although very important, it is obvious from the statistics and other research, that the current regulatory regime surrounding investment options and costs also is not working, yet it is costing millions of dollars in compliance. As an initial matter, nearly 14 years ago when it finalized the Section 2550.404a-5 Fiduciary requirements for disclosure in participant-directed individual account plans regulation, as the name suggests, DOL conflated fiduciary responsibilities with notice obligations. Through this regulation, DOL created an entirely new notice regime not otherwise contemplated by Congress. In addition, the requirements are typical of many current disclosure regulations in that more is better, rather than focusing on providing the most relevant information to have the most impact at the time it is received. For example, under the current regulation a participant is required to receive a list of all individual expenses that possibly could be charged against the account on or before the date the participant may first direct the participant's account. This information is clearly unnecessary at that time and not only will it be overlooked, but it will crowd out other more important information, such as the investment options.

This is not to say that participants do not need information on individual charges. However, they need that information when they are going to incur that charge, which is why the DOL should support more enhanced electronic disclosure which allows exactly for this and to allow more enhanced and effective disclosure.

The 2020 electronic media regulation (29 CFR Section 2520.104b-31 Alternative method for disclosure through electronic media— Notice-and-access) was a good step forward, however, much more can be done to allow for and encourage disclosure through electronic media.¹⁶ For years, industry has been advocating for electronic disclosure to decrease costs and improve the user experience. For example, in 2015, almost a decade ago, the SPARK Institute published a paper showing not only that electronic delivery would save participants money but that it also:

- Allows participants to respond quickly to plan information received electronically,
- Ensures information remains up-to-date and is accessed by participants in “real time,”
- Provides information that is more accessible and digestible,
- Provides information that can be more readily customized, and
- Provides a better guarantee of actual receipt of information.¹⁷

The report also highlighted that electronic disclosures can lead to better retirement outcomes through exposure to benefit calculator and other online tools that help participants

¹⁶ Although we believe that the Agencies should encourage electronic disclosure, if a participant wants to receive disclosures in other media forms, such as paper, such disclosure should be allowed because a participant should be allowed to receive notices in whichever form that best suits the individual. However, a plan should be allowed to elect the default media for disclosures.

¹⁷ “Improving Outcomes with Electronic Delivery of Retirement Plan Documents” prepared for The SPARK Institute June, 2015, available at https://www.sparkinstitute.org/content-files/improving_outcomes_with_electronic_delivery_of_retirement_plan_documents.pdf.

manage their accounts. Given the advances in technology since 2015 and the fact that according to a Pew Charitable Trust report dated January 31 2024, 95 percent of US adults say they use the internet,¹⁸ it is now even more important that the Agencies encourage plans to use electronic communication to disclose information. Furthermore, such use also allows plan sponsors to determine if information has been accessed and by whom, which can then allow them to determine what information is most relevant to participants. This simply is not possible with paper disclosures. In addition, providing disclosures electronically allows participants to have access to information when they need it and allows for easy retention of such documents. For example, most plans provide access to documents via a webpage through the service provider. The webpage will include not only the immediate information someone needs to enroll and make investment elections, but also information on one-time events, such as divorce or distributions and the cost associated with such events. Such information can be found with a quick search of the relevant term. Also, in this case, there is no need for participants to requests to have disclosures resent because the information is readily available at any time.

As noted in the RFI, the Agencies currently have standards relating to the manner in which notices must be written. For example, DOL regulation requires that the summary plan description be written in a manner reasonably calculated to be understood by the average plan participant.¹⁹ Because the American workforce is so diverse, it would be impossible for DOL to devise a specific standard that would fit every worker in the workforce. The current standard allows plan sponsors to evaluate their participants' needs to determine how to write and present information to them.

With respect to the foreign language requirement, in a recent proposed regulation, DOL attempted to impose a health plan regulatory requirement on a retirement plan notice, even though there was no statutory basis for it. The proposal would have required autoportability notices not only to provide taglines in a variety of languages, but also ensure that any call centers also have such language services available.²⁰ This requirement would have applied on a county-by-county basis where 10% of the population residing in the county is literate only in the same non-English language. This is very different from the current requirement applicable to summary plan descriptions under 29 CFR Section 2520-102-2 which requires foreign language assistance depending on the actual plan demographics. Given the expense of providing information in multiple languages, it makes more sense to base a foreign language requirement on the plan's actual demographics. Furthermore, under the current summary plan description regulation, the plan administrator is required to provide non-English speaking participant with "an English-language summary plan description which prominently displays a notice, in the non-English language common to these participants,

¹⁸ "Internet, Broadband Factsheet" Jan. 31, 2024 available at <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/#who-uses-the-internet>.

¹⁹ 29 CFR § 2520.102-2(a).

²⁰ [Chamber Comments on Automatic Portability Regulation | U.S. Chamber of Commerce \(uschamber.com\)](https://www.uschamber.com/automatic-portability-regulation).

offering them assistance.” The currently summary plan description regulation allows for such participants to receive information in a non-English language so that they are “informed as to their rights and obligations under the plan.” However, it is flexible enough so that the plan administrator can determine the appropriate type of assistance.

With respect to the presentation and design of notices, DOL should not mandate a one size fits all standard. Currently, plan sponsors use a variety of mediums and styles to communicate with their workforce. As noted above, given the importance of benefits to both employers and employees, plan sponsors have every incentive to ensure that the benefits are communicated in a format that is approachable and understandable to participants.

Conclusion

It has taken fifty years to get where we are with respect to reporting and disclosure, and, even though we know many of the current disclosures are not optimal, neither Congress nor the Agencies should rush into making changes merely for change sake. Instead, the Agencies should recommend a multiyear project with stakeholders to determine what disclosures are in fact needed, how they can be structures to change as needs and technologies changes, and what will cause the least disruption and cost for the system.

We appreciate the Agencies’ issuance of the RFI, and we look forward to working with you on this project.

Sincerely,

A handwritten signature in cursive script that reads "Chantel Sheaks".

Chantel Sheaks
Vice President, Retirement Policy
U.S. Chamber of Commerce