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Working for America's Retirement

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

SUBMITTED VIA
WWW.REGULATIONS.GOV

Re: Request for Information—SECURE 2.0 Section 319—Effectiveness of Reporting and Disclosure Requirements--RIN 1210-AC09 (RFI)

The American Retirement Association (ARA) is responding to the request for information regarding the effectiveness of existing reporting and disclosure requirements for certain retirement plans under ERISA. ARA acknowledges that the response submitted to the Department of Labor (the Department) will be shared with Department of Treasury (Treasury) and the Pension Benefit Guaranty Corporation (collectively, the Agencies). Thank you for the opportunity to provide input on these matters.

ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has more than 35,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Discussion

I. Challenges and Opportunities

The ARA appreciates that the RFI recognizes two perspectives on retirement plan disclosures: one is that of participants and beneficiaries -- the intended recipients of the disclosures -- and the other is that of plan sponsors tasked with providing the disclosures.

The determinative factor in the effectiveness of reporting *to* the Agencies is driven *by* the Agencies. The form, format, content, and timing of plan reports are prescribed by the Agencies which need to collect information to be able to perform their responsibilities with respect to oversight of the plans. The breadth, frequency, and detail of the reporting as well as the filing process, however, create challenges . For example, a recent trend is addition of detailed, technical questions to the Form 5500, but the questions sometimes are not readily understood by plan sponsors and are also not specific enough to

allow service providers to provide specific answers. This makes the Form 5500, for example, more burdensome, less accurate, and the information collected less useful. To improve the efficiency and efficacy of reporting, ARA recommends that Agencies ensure that any reporting element is narrowly crafted to promote correct reporting and generally limit the breadth of reporting to avoid undue burden. In addition, ARA strongly recommends the agencies invest in further development of electronic filing systems. The manual errors that arise each year, such as improperly denied extensions, create significant burdens on service providers and undue anxiety for plan sponsors. Electronic filing that drives automated processes will hopefully reduce the instances of these errors and reduce the overall burden of reporting. The Agencies have made substantial progress with expansion of computerized filings and ARA looks forward to continued expansion of these capabilities.

In contrast with reporting that is driven by an agency, the determinative factor in the effectiveness of disclosures to participants and beneficiaries depends on their personal preferences for receiving, retaining, or acting upon each disclosure. A disclosure, regardless of how well written or what information is included, will not be effective if it is delivered when the participant does not want it or in a form or delivery method that is not among an individual's personal preferences. Broadly, types of disclosures are made to participants:

i. *Requested Disclosures: A disclosure that is made when an individual who is seeking information initiates the request for information.*

Requested disclosures, because of regulatory flexibility, can be crafted to provide targeted information relevant to the information sought and delivered in ways that are effective for participants, taking into account the participant demographics, the industry, the request, and other relevant information.

ii. *Required Disclosures: A disclosure that is required by statute or regulation.*

Required disclosures, in contrast, generally are not requested by participants, and therefore are not going to be as effective when delivered. Participants are not seeking the information and the required content and length render them less effective than targeted information delivered when a participant is seeking information. This does not mean that required disclosures do not serve an important purpose, but the Agencies should acknowledge that the purpose is to serve as a future resource, rather than an immediate source of information. This changes the calculus of how such disclosures are effectively delivered because the focus should be on delivery and storage for future use, rather than delivery and immediate consumption. To the extent that an Agency believes a required disclosure should be immediately consumed, the Agency should provide employers with the maximum flexibility to provide the disclosure when the participant needs or is seeking the information, limit the content to only the most critical information, and permit delivery in ways that participants are likely to pay attention to and act upon.

The demographics of a plan's participants and beneficiaries can have a significant impact on the burden placed on each plan sponsor's attempt to deliver effective disclosures. The proliferation of alternative channels for delivering disclosures is a major challenge for plan sponsors. ARA encourages the Agencies to explore ways to permit and even encourage a plan sponsor to leverage its existing channel(s) for delivery of communications. For example, if participants are accustomed to receiving all benefits-related communications through an HR portal or dashboard that sends alerts, requiring delivery of required disclosures via mail or to a personal e-mail may be less helpful because it does not conform to the expectations of the individual. Permitting use of the ordinary channels of communication will

promote awareness and allow participants to later locate information because it is in the "usual" location.

II. Responses to Questions Relating to the Effectiveness of Reporting and Disclosure Requirements

1. Disclosures to Plan Participants and Beneficiaries – Receipt and Comprehension of Required Disclosures

Question 1. Number of required disclosures.

The effectiveness of participant disclosures is diminished by the number of required notices and disclosures that participants receive. Required disclosures may be received by a participant throughout the year. Disclosures like prospectuses, voting proxies, and Summary Annual Reports are often not reviewed by participants.

Because many of the disclosures are not requested by a participant and do not require action, participants may become accustomed to disregarding notices and disclosures provided by the plan. As a result, when notices relating to specific transactions, such as a recordkeeper conversion or fund change, do occur, the participant is less likely to read that disclosure. This makes disclosures warranting immediate action less effective. Instead, the ARA suggests the following:

- Required disclosures that are not related to a specific transaction should be combined to reduce the number of notices a participant receives concurrently. Further, to avoid creating an excessively long notice, the combination notice should be allowed to summarize important points and provide references to sources of additional information.
- A plan sponsor's demographics may require communicating varying levels of detail as needed by different populations of participants. Plan sponsors should be permitted to provide more or less detail as appropriate to their plan's participants.
- The Agencies should provide condensed model notices that provide information in a format to make it easier for the participant to find information that is personally relevant. The use of Frequently Asked Questions (FAQs), bullet points, italicized or bold text, glossary, and other similar techniques will increase a participant's comprehension and hence effectiveness of the disclosure.
- The Agencies should consider a joint task force of practitioners and representatives from each of the Agencies to review various notices and create alternatives providing participants with the ability to find information in which they have an interest.
- We encourage the Agencies to reduce legalese and technical jargon to improve comprehension of required disclosures both by plan sponsors and participants.

Question 2. Timing of required disclosures.

Requested disclosures also are driven by participant-initiated events such as requests for withdrawals, loans, distributions, deferral election changes, and beneficiary designations. These primarily are life events. Disclosures and notices that focus on specific life events are highly relevant to a participant and

should have a focus on the most common events and any actions needed to be taken by the participant. The notices should identify resources addressing less common events.

Required disclosures such as participant fee disclosures, Summary Annual Reports, Annual Funding Noticed, (AFNs), Summary Plan Descriptions (SPDs), Summary of Material Modifications (SMMs), Qualified Default Investment Alternatives (QDIA) notices, Safe Harbor notices, and auto-enrollment notices provide general information, are distributed to all or almost all participants, and typically are sent out annually. These notices have differing deadlines: SPDs and SMMs key off of changes to the plan document; SARs and AFNs key off of the Form 5500 filing due date; and participant fee disclosures, QDIA notices, Safe Harbor notices and auto-enrollment notices key off of the plan year. These differences result in participants receiving information piecemeal and, because virtually none require any action from the participant, promote a culture of disregarding plan notices. Allowing these notices to be combined and sent at the same time would be more efficient and less confusing to plan participants.

Required disclosures linked to a transaction, such as communicating changes in investment funds and changes in fees provide general information, also are widely distributed, and the deadlines are generally 30 days preceding the event. These notices almost always do not require action by most participants. The Agencies should consider reducing the required number of days preceding the event to deliver the notice timely as appropriate to the channel of communication used to send it to the participants.

Question 3. Content of required disclosures.

The effectiveness of participant disclosures also is diminished by the length of a disclosure and the cumulative length of all disclosures communicated concurrently. Condensed notices or disclosures that highlight important points (for example, tax consequences of a withdrawal), and refer participants to additional sources of information would improve effectiveness and engagement. For example, a notice that, where possible, leverages the Summary Plan Description would reduce the length of many of the required notices.

For required disclosures, reducing the amount of redundance, verbiage, and legalese that does not contribute to the core message of the disclosure will improve the likelihood that a participant will read and understand the disclosure. For example,

- Disclosures often say something using legalese or technical terms. Providing a template of the required disclosure to the plan sponsor who could then use simple, common terms in the text of the disclosure and map those terms in a glossary to the more technical definition could simplify the language and increase comprehension.
- Required disclosures have required elements that often include a lot of the information readily available in the SPD. Allowing references in the required disclosures to the SPD would reduce the length of the disclosures.

Finally, the Summary Annual Report generally is not useful to participants although required by statute. The section regarding the right to additional information could be replaced with a sentence that explained a full copy of the report is available online at: https://www.efast.dol.gov/5500search/ by typing in the plan name or EIN.

Question 4. Comprehension of information furnished in required disclosures.

Please see the response to Question 1 above for our comments regarding the length, style, and complexity of disclosures. To those, we would add that participants' understanding of a required notice generally can be measured by responses (actions taken as a result) as well as calls received in response to the notice.

As for methods of delivery, these vary significantly by demographic, and these variances extend not only to the length and complexity of the disclosures, but also extend to how each demographic accesses that information. In addition to printed notices, differing demographics can have a differing preference for receiving information from mixed media presentations, social media, podcasts, video, text messages, email, and potentially other emerging technologies. An individual's preferences would determine the level of further engagement and understanding.

Question 5. Plain English; foreign language-based issues; underserved communities.

Required disclosures and notice requirements tend to devote more space to and provide a level of detail that is beyond the needs of the majority of participants. The Agencies should consider reducing the required content important core points with an index having links to make it easier for a participant to locate relevant information. For example, financial organizations are taking this approach to large disclosure documents.

The Agencies should provide shortened model notices that provide information in summary format. This will contribute to comprehension by participants, as will FAQs, bullet points, italicized, text, glossary, and other similar techniques are conducive to multiple formats would help ensure participant understanding.

Finally, considerations of methods to increase disclosure effectiveness in underserved communities for now are best left to the employer and plan sponsor. They are best positioned to address the needs of these communities across their relationship with their employees.

Question 6. Accessing required disclosures.

Confirmations of receipt of required disclosures generally is not collected or retained, nor is it readily trackable at a reasonable cost for notices delivered on paper via a delivery service. Delivery of information through on-line delivery channels and capture of rudimentary statistics can be accomplished through software. The technology is not widely available from service providers for smaller plans, and confirmation of delivery does not measure whether participants read, comprehended, or took appropriate action in response to the communication.

Question 7. Retaining disclosures after receipt.

Plan administrators and plan service providers generally do not collect data on the participant/beneficiary rates for receiving nor on participant retention of notices and disclosures. Moreover, ARA is not aware of any statistics on the retention of historical disclosures by participants, plan sponsors or service providers. Anecdotally, participants rely on the plan sponsor or service provider

to have historical disclosures; some plan sponsors, particularly smaller companies or those with turnover in the HR function, rely on service providers to maintain a record of historical disclosures; and service providers often do not retain historical disclosures beyond a few recent years.

Question 8. Participant and beneficiary engagement; decision-making.

Plan Administrators generally do not collect data on participant engagement with required disclosures, and most required disclosures do not require a participant to take an action that is trackable. Rather, tracking generally is focused on actions initiated by participant request disclosures, participant elections, and investing behavior.

If a notice is legally required and cannot be changed, measuring the effectiveness of such a notice would not be worth the burden and cost. The Agencies may consider a study of this type of notice to see what effect, if any, it has on participant comprehension.

2. Disclosures to Plan Participants and Beneficiaries – Receipt Plans, Plan Administrators, and Plan Service Providers – Furnishing Required Disclosures

Question 9. Provision of preferred contact information to plans.

Data on when employee contact information generally is updated is not widely tracked. Many software platforms offer an option to the plan sponsor to allow participants to change some or all of the participant's contact information, and an option on whether the change is subject to approval by the plan sponsor. Service providers most commonly track only current contact information where contact information is submitted to the service provider via a data link with the plan sponsor. The ARA suggests that the Agencies consider studying this in a focus group of a large number of participants.

Question 10. Delivery—furnishing disclosures to participants and beneficiaries.

Participants who prefer to receive required disclosures electronically most often wish not to receive any paper disclosures. The Agencies should consider adopting unified set of electronic delivery standards across all Agencies including what are acceptable procedures for opting in or out of delivery channels.

Question 11. Availability of model notices or model language.

Models for required notices provided by the Agencies are widely embraced because they save money, ensure compliance, and provide consistency. The Agencies should draft models in the form of templates that allow plan sponsors some flexibility to tailor the names of features that the plan sponsor uses in its communications to participants. Models should be concise and include only core messages with links, site addresses, and cross-references used for information that the agencies find important but not core to the purpose of the notice.

Question 12. Participant and beneficiary feedback regarding notices and disclosures.

In general, few questions arise from required notices and disclosures (other than the annual funding notice). Typically, participants ask questions only when they understand that a change may be occurring.

Most questions regarding the plan originate in participant interactions with financial consultants, educators, or plan sponsors' benefits staff. In addition, negative consent notices do appear to be effective for automatic enrollment plans, which see that engagement will occur if the participant desires an alternative outcome.

Question 13. Costs of disclosure.

The cost of producing and mailing printed material is significant for plans with a large number of employees and/or former employees with account balances. There is very little opportunity to reduce the total cost of each mailing since postage, stationery and production are fixed costs per mailing. However, consolidation of notices and reduction in the length of notices would permit reduction of these costs. Electronic delivery may reduce costs decline significantly. Each service provider may decide whether to include the cost of electronic delivery in its administrative fees or quote the cost as a separate charge.

As an example, service providers incur costs of providing disclosure infrastructure (e.g. template or sample notices, mechanisms to populate plan specific information and the actual delivery infrastructure) in addition to the costs of actual delivery of disclosures to plan participants. For example, the relatively recent changes to Forms W4-R and W4-P to include the marginal tax rates and examples for the upcoming tax year. While these revisions had the goal of participants electing more accurate tax withholding from retirement plan distributions, participants are not paying attention to the disclosure. There are significant annual costs associated with updating distribution forms. In addition to annual technology programing costs to update online distribution interfaces, there are costs associated with updating paper distribution forms. It is common for service providers to maintain separate distribution forms for each type of plan (e.g., 401(k), 403(b), 457(b)), each type of distributable event and each type of recipient (e.g., participant, beneficiary). In addition, it is common for service providers to customize each of these forms for business partners and individual employer plans. The result is a significant number of forms (dozens or even hundreds) that require modification, quality control reviews, posting to websites or other forms of delivery (which can be dependent on actions by plan sponsors) to the required audiences and the creation and delivery of multiple pieces of communications necessary to explain the changes to plan business partners, plan sponsors and participants. Typically, this must be accomplished within thirty days during one of the busiest times of the year. The ARA questions whether these extensive, ongoing costs may be justified by the benefits of the disclosure.

3. Reporting to the Agencies -- Submission of Required Reports by Plans

Question 14. Frequency and timing of reports

The number of reports that must be filed with the Agencies is not onerous given the purpose of each report.

Preparation of the annual Form 5500 series consumes the greatest amount of time, effort, and cost for the plan and its service providers. The ARA believes that this process may be made more efficient in certain respects. For example, the Form 5500 series extensions are automatic only if filed timely. A change to recognize that any Form 5500 is timely if filed within 9 1/2 months after plan year end would eliminate the whole extension process. (Penalties for late filers could still recognize the current 7-month due date as an incentive to comply.)

As another example, new compliance questions require programming, education of plan sponsors, and data collection from plan sponsors by vendors. If compliance questions relate to transactions, programming may need to be in place prior to the beginning of the impacted plan year. We recommend Agencies limit the use of compliance questions to important information they need to collect. The Agencies should engage with industry groups prior to finalizing questions to receive feedback on whether the specific questions as written will generate the feedback the Agencies need, and to address any privacy and related concerns. We recommend requiring notice at least 18 months prior to the beginning of the plan year to which the question will apply to allow for programming, education, and data collection.

Question 15. Content of reports.

The ARA believes that the reporting currently required by the Agencies is sufficient for discharging their mandates oversight and other responsibilities.

Question 16. Clarity of reporting requirements.

Agency forms that refer to sections of statutes or regulations are not easily understood by plan sponsors who are tasked with verifying the completeness and accuracy of the information. For example, the Form 5330 could be written in plain English to enhance clarity. In addition, providing names for these sections of the statue can be meaningful to plan sponsors. Further, determining actual tax liability for payments covering multiple years is complicated. In this regard, examples are very helpful. We also note that in general, individuals who prepare required reports by plans are proficient in English (and in some cases are fluent in other languages).

Question 17. Efficacy of filing methods for reports.

Treasury lacks a direct e-filing interface for all forms, and software providers struggle to quickly adapt to new e-filing mandates. This poses an administrative burden for plans, plan administrators, and plan service providers in finding compliant vendors. Establishing a standardized method for submitting information or creating credentials, similar to the Department's username and pin system, would help ease the compliance burden on filers. The ARA recommends that the Agencies consult with industry software providers and consider the time frames for communicating changes in requirements including implementation and acceptance testing to avoid complications with release of software.

Question 18. Improving Agency assistance with reporting requirements.

Agency communications to taxpayers are often too vague. When plan sponsors receive correspondence from Agencies, they often do not understand the issue nor what is being requested of them, resulting in undue alarm. For initial contact letters, the Agencies should consider using less alarming language to explain the purpose of the letter and the expected time frame for a response.

When communications are system-generated, they are often re-sent even when the plan sponsor or its agent has been corresponding with the agency. The Agencies should explore timely updating of systems to avoid duplication of system-generated communications. Additionally, when contact is made with an agency, information provided by one agent often differs from information provided by another agent.

For example, when a taxpayer calls the Treasury in response to a notice that may have been sent in error, answers vary from:

- Total lack of awareness of the particular issue by the agent;
- Awareness of the issue but no knowledge of a solution;
- Specific instructions to the taxpayer to not take action (often because the issue will be resolved by Treasury); or
- Instructions to contact another group to resolve the issue.

The ARA recommends that the Agencies consider:

- Establishing customer service teams staffed or backed up with specialists knowledgeable about the requirements for each form;
- Creating a voicemail box for each form;
- Establishing a system for communication to all agents/call centers when an error is discovered that caused a false or incorrect notice to be sent; and
- Creating a method for agents to suppress mailing of future notices, as appropriate, when a taxpayer has contacted the agency.

Question 19. Costs of reporting.

Annual aggregate costs are not readily determinable, although annual audit costs associated with large plan filing of Form 5500 is substantial. Data on costs paid from plan assets is determinable form Schedule C and Schedule H data. Aggregate annual cost varies by type of plan, plan design, demographics, organizational structure of the plan sponsor, investment menus and many other factors.

4. Reporting to the Agencies—Participants, Beneficiaries, and Third Parties—Use of Publicly Available Information and Data

Question 20. Use of reports and data by participants and beneficiaries

Public access to Form 5500 filings on EFAST2 appears to satisfy participants' requests for this information.

Question 21. Use of reports and data by other entities.

The ARA does not believe that additional reporting is needed for other entities' use. Sufficient information already is provided, and multiple end users report and analyze data.

5. Additional Questions

Question 22. Coordination of Agencies' reporting and disclosure requirements.

Coordination among the Agencies for the reporting of plan information is desirable. For example,

having a single unified standard for e-delivery requirements would be helpful.

Question 23. Alternative methods for information collection.

The Agencies should consider engaging professional firms that have expertise in collecting, validating, and reporting to different constituencies information from varying sources and technologies.

Question 24. Additional information.

Plan sponsors communicate with plan participants about administrative decisions that are implemented prior to required adoption of plan amendments. For these situations, the ARA believes that it would be helpful to have prescribed procedures for these communications.

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ARA appreciates the opportunity to work with the Department on these issues of great importance to our diverse membership of retirement marketplace participants. We would welcome the opportunity to discuss these comments further with you. Please contact Allison Wielobob, ARA's General Counsel, at AWielobob@USARetirement.org regarding any questions on the matters discussed herein. Thank you for your time and consideration.

Sincerely,

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