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Via Electronic Mail: good.larry@dol.gov

Larry Good
Executive Secretary
ERISA Advisory Council
US Department of Labor
Suite N-5623
200 Constitution Ave., NW,
Washington, DC 20210

Re: ICI Comments Regarding Mandated Disclosure for Retirement Plans—Enhancing Effectiveness for Participants and Sponsors

Dear Mr. Good:

The Investment Company Institute[1] is providing this written statement in connection with the August 22-24, 2017 meeting of the 2017 ERISA Advisory Council (the "Council") on the topic "Mandated Disclosure for Retirement Plans—Enhancing Effectiveness for Participants and Sponsors." The Council seeks input in providing draft materials and recommendations to the Department of Labor (the "Department"), "including guiding principles for use in streamlining existing Department of Labor disclosures and developing future disclosures in an effort to ease the regulatory burden to both plan sponsors and participants while enabling those disclosures to be more useful to the participants and beneficiaries that receive them and other audiences who may utilize them."[2]

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[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$20.0 trillion in the United States, serving more than 95 million US shareholders, and US$6.0 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

[2] *See* 2017 ERISA Advisory Council Issue Statement, available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans-enhancing-effectiveness-for-participants-and-sponsors-issue-statement.pdf.

We commend the Council for embracing the important issue of enhancing disclosure for participants and sponsors, and we welcome presenting our views on how best to accomplish this important undertaking. ICI supports efforts to help participants in defined contribution plans better understand their plans and the investments available to them. We previously testified before the 2009 ERISA Advisory Council on its related topic, "Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries," upon which the Council intends to build.[3]

Following a summary of our recommendations in Section I below, the letter in Section II describes how the Department should streamline and consolidate required notices to make them more effective for participants and also eliminate redundant and irrelevant notices. Section III describes how a "quick start" guide could enhance disclosure, and Section IV explains how disclosures should focus on participants' decision points. Finally, in Section V, we describe the advantages of electronic delivery to enhance the content and usability of disclosures.

I. Summary of Recommendations.

- The Department and Internal Revenue Service (IRS), working together, should find ways to streamline and consolidate existing notices in a way that will focus participants on the key information they need for effective decision making under the plan, while ensuring the availability of more detailed information for further reference.

- The Department should consolidate information as much as possible in the Summary Plan Description (SPD), which should serve as the "owner's manual" for the plan.

- Regulators should encourage the use of a plain language "quick start" guide upon enrollment, consolidating the key information from the SPD, together with information about investment options that participants need to make the core decisions when they enroll in the plan.

- The Department should modernize its electronic delivery rules to allow plans and service providers to harness the ability of the internet to present information in interlinking layers, allowing participants to access information in a summary format with connectors to more detail. The effort should be done jointly with IRS to harmonize the electronic disclosure rules of both regulators.

Taken together, our recommendations derive from three fundamental concepts. First, participant disclosure will be more effective if the delivery of information corresponds to participant decision points—for example, enrollment, change of administrator, or termination—while also providing

[3] *See* testimony of Lisa Hund Lattan, Vice President and Associate General Counsel, American Century Investments, on behalf of the Investment Company Institute (September 15, 2009).

participants ready access to a complete collection of information about their plan and investments that may be of general interest or become relevant as circumstances change. Second, disclosure should harness the benefits of technology to deliver key information concisely and provide access to additional information with the click of a mouse (or by a request on paper for participants without computer access). Third, to further enhance the effectiveness of disclosure, the Department and IRS should work closely together to focus and consolidate required disclosures and facilitate electronic delivery of information.

II. The Department Should Streamline and Consolidate Notices to Make Them More Effective.

The Council asks whether there are duplicative disclosure requirements and/or specific disclosures that could be eliminated or combined to relieve the burden on the plan sponsor and/or the participants and beneficiaries.

The number of notices that plan administrators must provide to participants and beneficiaries has grown exponentially since ERISA was enacted in 1974. Originally, it was the intent of Congress that one document—the summary plan description—serve as the notice that informed participants of their rights and obligations. Since then, a significant number of new notice requirements—now numbering more than 30—have been imposed under ERISA and the Internal Revenue Code (the "Code"). Many of these notices must be provided upon enrollment and annually thereafter, although the specific timing requirements vary according to applicable regulations.

The proliferation of notices, sent at multiple and different times throughout the year, only serves to confuse and overload many participants. This results in many participants ignoring notices and other information. To provide more effective disclosure to participants, the Department should consolidate these notices, where possible, and should work to eliminate those notices that are no longer useful.

A. Consolidation of notices would eliminate duplication and better focus participants on key information.

The notice and content requirements that the Department and IRS impose include many examples of duplication and overlap. The Department and IRS should work together to streamline and consolidate existing notices and content to focus participants on the key information relevant to the decisions they must make, while ensuring that more detailed information is available for their reference if needed.

Set forth below are a few examples of duplication and overlap that the agencies could alleviate by consolidation.

Investment information at enrollment. Plans that allow participants to direct their own accounts must provide a series of notices in addition to the SPD that, as a whole, are intended to help participants decide how to allocate their accounts among plan investment menus. The regulations for plans relying on ERISA section 404(c) require that participants receive certain investment information, such as the investment objective of each available investment option, as well as a prospectus for SEC-registered investments. For plans relying on the qualified default investment (QDIA) safe harbor, the QDIA rules require a slightly different set of information about the investment designated as the plan's QDIA.[4] If the plan utilizes automatic enrollment, the QDIA information may be combined with the plan's automatic enrollment notice, but the QDIA information may not be combined with any other disclosures or notices, including the SPD.[5] The existing requirements, fundamentally, are designed to provide disclosure to assist participants in making the key decision on how to allocate their account (including whether to select investments other than the plan's QDIA). If one were designing the "at enrollment" disclosures to participants from scratch, these rules would be integrated so that the same key information is provided for each investment option, and the QDIA is identified among those options, with reference to how the participant can obtain more detailed information about each investment.

We suggest that the Department allow plans to comply with the participant disclosure regulation, the QDIA notice, and the automatic enrollment notice using a single document describing the key features of the plan's investment menu and how a participant's account will be invested in the absence of the participant providing an affirmative direction.

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[4] The information required in the ERISA section 404(c) regulations for each investment option includes: a description of the investment alternative; a general description of the investment objectives and risk and return characteristics of each such alternative; identification of any designated investment managers; an explanation of the circumstances under which participants and beneficiaries may give investment instructions and an explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfers to or from a designed investment alternative, and any restriction on the exercise of voting, tender and similar rights appurtenant to a participant's or beneficiary's investment in an investment alternative; a description of any transaction fees and expenses in connection with purchases or sales; additional information regarding confidentiality in the case of employer stock; and in the case of an investment alternative which is subject to the Securities Act of 1933, a copy of the most recent prospectus provided to the plan. In contrast, for a QDIA, the information required is: a description of the qualified default investment alternative, including a description of the investment objectives, risk and return characteristics, and fees and expenses attendant to the investment alternative; a description of the right of the participants and beneficiaries on whose behalf assets are invested in a qualified default investment alternative to direct the investment of those assets to any other investment alternative under the plan, including a description of any applicable restrictions, fees or expenses in connection with such transfer; and an explanation of where the participants and beneficiaries can obtain investment information concerning the other investment alternatives available under the plan.

[5] The Department specifically rejected the idea that the QDIA information could be combined with other "at enrollment" information, either by incorporating it into the SPD or other notice provided at enrollment, other than the automatic enrollment notice. *See* 72 Fed. Reg. 60452, 60454 (October 24, 2007).

Distribution information. When participants terminate employment or retire, they receive information in a variety of notices, including information described in the SPD on the plan's distribution options, the tax consequences of various distributions described in the notice under Code section 402(f), the right to leave their accounts in the plan (and the consequences of failing to do so) described in the 411(a)(11) notice, and information on the plan's automatic rollover procedures for small accounts. While the notices taken together assist participants in making the key decision of whether to keep their accounts in the plan or receive a distribution, and in what form their distribution should be taken, the receipt of multiple, overlapping notices can serve to confuse participants and cause them to disregard important information. There is no public policy reason not to consolidate and integrate the disclosures that terminating and retiring participants receive.

Safe harbor notices. Defined contribution plans operating under the Code safe harbor must provide participants with an annual notice. While the intent of the notice is to inform the participant about one feature of the plan—i.e., the fact that it is a safe harbor plan—much of the information in the notice, such as the level of matching contribution, the plan's vesting rules, and the method for making deferrals, replicates information contained in the plan's SPD. The information is relevant to the decision to enroll in the plan (and at what level) for any 401(k) participant, not just those in safe harbor plans, and the fact that the plan is a "safe harbor" plan is at most only marginally relevant to the decision to enroll in the plan or continue to contribute each year. That the safe harbor notice is separate from the SPD is largely an accident of the safe harbor rules falling under the Code, which is administered by the IRS. The Department and IRS should work together to incorporate the safe harbor notice information into the SPD.

The foregoing examples illustrate how existing notices duplicate and overlap each other and fail to focus participants' attention to the key information that they need to make the decisions the plan charges them to make. The Department and IRS should work together to take a comprehensive look at all of the notices required by statute or regulation and determine how they might be integrated and consolidated to focus the participant on the key information they need for their decision making.

B. The Department should recommend the elimination of redundant and irrelevant notices.

A number of notices that are currently sent to participants have become redundant or irrelevant. We understand that the Department does not have the authority to simply eliminate notices that are required by statute. However, the Department could recommend Congressional action to simplify disclosure requirements by eliminating notices that are no longer useful.

The following notices should be eliminated:

Summary annual report (ERISA section 104(b)(3)). This notice summarizes the annual report (Form 5500) filed by the plan with the Department, IRS, and Pension Benefit Guaranty Corporation. For example, it reports total assets, expenses, and income of the plan, and information on how to obtain the full annual report. The summary annual report is much less useful than the pension benefit statement that participants currently receive. Unlike the annual report, the pension benefit statement provides specific information particular to the participant's account or benefits. For participants who still want to receive a copy of the annual report for their plan, the "quick start" guide described below could alert participants that they can request a copy.

Deferred vested pension statement (Code section 6057(e)). This section requires plan administrators to provide participants who have separated from service with a statement of deferred vested benefits. In practice, this is now duplicated by the pension benefit statement requirement under ERISA section 105.

Pension benefit report (ERISA section 209). This section requires a plan administrator to furnish a report to employees sufficient to determine their benefits. This notice is redundant because of the pension benefit statement requirement under ERISA section 105, which requires benefit statements either on a periodic basis or upon request.

III. A "Quick Start" Notice Would Enhance Disclosure for Participants.

In the Council's issue statement for this topic, the Council specifically asks whether a "Summary/Quick Start Guide" to disclosure would help achieve the Council's objectives on this topic. In our view, such a guide is one of the best ways to streamline disclosure.

As we testified before the Council in 2009,[6] we strongly recommend consolidating as much information as possible in the SPD. In this way, the SPD could serve—as it was originally intended—as an "owner's manual" for the plan. Like any owner's manual, it should contain, in plain English, both the key features of the plan as well as information relevant to special situations that might arise. It should be the basic document to which participants can refer for information about the plan. We recognize that very few people read an owner's manual cover to cover, but they retain it as a reference when they want to know about a particular button or how to diagnose the cause of a particular problem. We believe this is the function the SPD should serve.

[6] *See* footnote 3, *supra*.

For this reason, the Department should encourage plans that deliver SPDs at enrollment (along with other enrollment information) to also provide the kind of "quick start" guide used successfully by consumer products. The quick start guide allows an owner to use the device without having to read the long, detailed user's manual cover to cover. A plan quick start guide could provide participants with information in a concise and accessible presentation format, focusing them on the key information relevant to the decisions they need to make at enrollment. Such a format would make it more likely that participants will actually read and retain the information and therefore be better able to make good decisions. A quick start guide on a 401(k) plan might include:

- When the employee is eligible to participate.
- Information on employer contributions, and the conditions for vesting.
- Key information on the plan's investment options, presented in a concise format. If applicable, identifying the plan's default investment.
- Basic information on the plan's default automatic enrollment rules, if applicable.

The quick start notice could combine the information currently in the following 11 notices:

1. Qualified default investment alternative notice (ERISA section 404(c)(5)(B) and DOL Reg. section 2550.404c-5(d));
2. Notice of availability of cash or deferred election (Treas. Reg. section 1.401(k)-1(e)(2));
3. Participant fee and investment disclosure (DOL Reg. section 2550.404a-5);
4. Safe harbor notice (Code section 401(k)(12)(D) and Treas. Reg. section 1.401(k)-3(d));
5. ERISA automatic contribution arrangement notice (ERISA section 512(d)(3));
6. Eligible automatic contribution arrangement notice (Code section 414(w)(4) and Treas. Reg. section 1.414(w)-1(b)(3));
7. Qualified automatic contribution arrangement notice (Code section 401(k)(13)(E) and Treas. Reg. section 1.401(k)-3(k)(4));
8. Automatic enrollment under eligible combined defined benefit and defined contribution notice (Code section 414(x)(5)(B));
9. ERISA notice regarding availability of investment advice (ERISA section 408(g)(6) and DOL Reg. section 2550.408g-1(b)(7));
10. Code notice regarding availability of investment advice (Code section 4975(f)(8)(F)); and
11. Proposed regulations regarding target date funds (75 Fed. Reg. 73987 (Nov. 30, 2010)).

Plans could decide which of the aforementioned notice requirements to satisfy through the combined quick start notice. Similarly, when a participant leaves employment, the various notices and information that are provided could also be summarized in a "quick start" guide addressing distribution options and tax implications. Many plans already provide this sort of summary information presented in a non-legalese format in enrollment and distribution packets, in addition to all the legal notices

required. The Council should encourage the use of such summary materials and recommend that the Department, working with the IRS, find ways to consolidate the information into the "owner's manual" or SPD and encourage the delivery of key information at decision points into "quick start" guides.

A useful precedent is the Securities and Exchange Commission's (SEC) revamping of mutual fund prospectuses. Fund prospectuses had over the years faced a similar problem that we see in the plan world—prospectuses were overloaded with information, all of it responding to a particular public policy need but as a whole overwhelming to an investor trying to understand a mutual fund. To respond to this problem, the SEC amended its rules to allow for the use of the summary prospectus—the mutual fund equivalent of the "quick start" guide—which contains the key information that every investor should consider in connection with a potential investment in a mutual fund, including its objectives, fee and expenses, principal investment strategies, the risks associated with an investment in the fund, historical fund performance, investment advisers and sub-advisers, and tax information. In lieu of providing the full statutory prospectus, mutual funds can provide the summary prospectus, which includes information on how the full statutory prospectus can be found on the internet and requested in paper format. Mutual funds using the summary prospectus now post their summary and statutory prospectus online, using hyperlinks to allow investors to move back and forth between the summary prospectus and the more detailed discussion in the statutory prospectus. In developing the summary prospectus, the SEC worked with the mutual fund industry to develop technical protocols and delivery rules that would not be unduly burdensome or costly.

IV. The Department Should Focus Disclosure on Decision Points.

The Council asks when disclosure should be made to participants to optimize the objective of the specific disclosures. Notices are most effective when the participant receives them at the point in time at which a decision relevant to the participant needs to be made—referred to as "just in time" disclosure.[7] Decisions typically need to be made when employees become eligible to participate, when they terminate employment, when they experience some type of life event, or when there is a change to the plan or the investments available.

Employees have two key decisions to make upon becoming eligible to enroll in a 401(k) plan—whether to contribute to the plan (and at what level), and how to allocate their monies among the investment options plan fiduciaries have selected. At the point of enrollment, many of the required notices, and

[7] *See* page 15 of Peter P. Swire and Kenesa Ahmad, "Delivering ERISA Disclosure for Defined Contribution Plans—Why the Time has Come to Prefer Electronic Delivery," submitted to the Department on June 14, 2011 in response to the Department's request for information (RFI) on electronic delivery by employee benefit plans, available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB50/00074.pdf.

much of the information in the SPD, are irrelevant, or only marginally relevant, to these key decisions. The information that participants receive upon enrollment, therefore, should focus them on certain key information tailored to making those initial decisions.

After enrollment, participants will subsequently need to periodically monitor their accounts, consider whether to modify their contribution levels, and decide whether to reallocate their investments among the plan's options. Clear and focused periodic notices, such as quarterly benefit statements and the summary annual report, not only deliver important reference information to participants, but also serve as triggers to encourage participants to undertake the necessary review of their accounts, contribution levels and investments. Upon termination of employment or retirement, participants are faced with the key decision about whether to leave the account in the plan or take a distribution among the options available in the plan, and the information they receive at that time should facilitate these decisions, not deter from them by including unnecessary and irrelevant information.

Most of the other required notices address special situations that a participant or beneficiary may encounter and in which additional information is needed, such as when the participant considers taking an in-service distribution or loan, faces a divorce, or an unusual plan event occurs, such as a plan blackout or reduction in employer contributions. For the reasons discussed above, this information is most useful and effective when the participant receives it at the relevant decision point and not before.

V. Improved Electronic Delivery Rules Would Enhance Disclosure for Participants.

Allowing plans to make electronic delivery the default method for communicating with participants (but allowing participants to opt for paper) would enhance the effectiveness of ERISA communications. The Council should urge the Department to modernize its existing delivery rules to reflect the dramatic changes in technology over the 15 years. In doing so, the Department should work with the IRS to develop consistent electronic delivery rules.

A. Electronic delivery provides more effective disclosure than paper.

The Department's rules for the content of required 401(k) plan disclosure appropriately focus on the decisions participants make and the information they need for those decisions. They focus on communicating the right amount of information to participants and avoiding information overload. *How* information is delivered can help enhance the effectiveness of the communications by highlighting key information, making additional information readily available, and enabling recipients to readily take action on the information. Electronic delivery is uniquely suited to meet this objective and can do this more effectively than paper delivery.

By facilitating electronic disclosure, the Department can streamline the disclosure notice regime without eliminating content that may not be of primary importance but should continue to be available. This method allows for a short, simple notice that provides key context up front, which participants will be more likely to read.[8] The click-through/hyperlink nature of the internet allows participants to see exactly the level of information that is right for them.

The SEC's enhancements to mutual fund prospectuses described above is instructive. By harnessing the layered nature of the internet, the SEC rules allow for a "less is more" approach without sacrificing or eliminating any of the detailed information mutual funds must provide. We believe a similar solution is possible for the SPD and all the other notices and disclosures plans must provide to participants and beneficiaries.

Electronic delivery makes it easier for participants to access more information or to take action. When a participant receives a paper notice, the participant must shift to another channel to take action, such as completing a paper form, making a phone call, or visiting a website. A large recordkeeper indicates that generally information provided via e-mail yields response rates that are three times higher than those from print communications.

In the case of the participant fee disclosure regulation that the Department finalized in 2010, the regulation requires plans to furnish participants on enrollment and annually thereafter key information presented concisely in a comparative format and make available a website where participants can get more information, such as information about the risks associated with each investment and updated performance information. Facilitating electronic delivery of the required information and comparative chart would enhance significantly a participant's ability to understand and respond to the comparative information. Participants could click through to obtain risk or updated performance information on the website or take action to change any investments in response to fee and performance information presented in the chart.

For certain segments of the population, electronic disclosure plays an even more vital role in the participant's understanding of the notice. Electronic delivery can offer advantages and easier access to plan information for visually impaired individuals and others with disabilities.[9] For example, with electronic delivery, visually impaired individuals can use software to read e-notices to them or to increase the font size of e- communications. If a plan uses e-delivery, individuals with disabilities could access plan communications either via e-tools or by requesting a paper copy. Electronic notice is also better for participants who do not read English easily or who prefer to read in a language other than English. Participants have access to a number of free translation programs online. It is much easier to

[8] *Id.* at page 14.

[9] *Id.* at page 7.

use these programs with an online notice than a paper notice which would require them to key in the text before they can apply the software.[10]

B. Regulatory impediments are currently the most significant barriers to employers' use of electronic media.

In light of all of the information above, one may wonder why more plan sponsors do not use electronic delivery for notices, if electronic delivery is indeed far superior to paper. ICI members that work with plans on complying with ERISA disclosure requirements report that regulatory impediments are the most significant barriers to increasing the use of electronic media in 401(k) plans. Lack of interest by plan sponsors and plan participants are not impediments to electronic delivery of information and electronic interface between plans and participants.[11] We believe that any low rates of the specific participant-by-participant affirmative consents required by the Department's 2002 rule (described below) most likely are due to factors, such as participant inertia or the administrative burdens associated with obtaining individual consents.

In 2002, the Department established a safe harbor for plans that wish to use electronic media to satisfy disclosure obligations under Title I of ERISA. To fall within the safe harbor, a plan administrator has to satisfy the "affirmative consent" requirement for a participant, beneficiary or other person entitled to documents who does not have access to the employer's or plan sponsor's electronic information system as an integral part of his or her employment duties. Prior to consenting, a participant or beneficiary must be provided with a clear and conspicuous statement indicating the types of documents to which the consent would apply, that consent may be withdrawn at any time, the procedures for withdrawing consent and updating necessary information, the right to obtain a paper copy, and any hardware and software requirements.

Separately from the Department's 2002 safe harbor, the Department has two other separate regulatory standards that govern when a plan can provide required disclosures electronically in particular

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[10] *Id.* at page 8.

[11] *See* page 19 (responding to Question 6) of letter from Mary S. Podesta, to Office of Regulations and Interpretations, Employee Benefits Security Administration, US Department of Labor (June 6, 2011), available at https://www.ici.org/pdf/25270.pdf.

circumstances.[12] The IRS applies a different regulatory standard for when plans can use electronic delivery to provide disclosures that are required under the Code.[13]

The single most important way to remove impediments to electronic delivery is for the Department to adopt a rule that encourages, rather than constrains, electronic delivery. And the best way to address any remaining concerns the Department has about technological illiteracy or privacy would be to impose a general standard on plans to take appropriate measures to ensure the plan's system for furnishing documents fosters actual receipt and protects confidentiality of personal information. This standard would further encourage employers to take necessary steps to deal with any technological illiteracy of any worker groups or privacy issues in connection with moving to electronic delivery. The Department and IRS should work together to modernize the electronic disclosure rules, so that plans and their service providers are not forced to grapple with inconsistent requirements.

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ICI appreciates your consideration of our comments. If you have any questions or wish to discuss these issues further, please do not hesitate to contact David Abbey at 202-326-5920 or david.abbey@ici.org or Shannon Salinas at 202-326-5809 or shannon.salinas@ici.org.

Sincerely,

/s/ David M. Abbey

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/s/ Shannon N. Salinas

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[12] For pension benefit statements, a DOL Field Assistance Bulletin (FAB) allows the "post and push" method, whereby plan sponsors can use a continuous access secure website for the posting of benefit statements, provided that individuals are notified how to access the website and that they can opt out and receive free paper disclosures instead. DOL Field Assistance Bulletin 2006-03. Participant fee disclosures can be made electronically if the participant voluntarily provides an email address, but the fact that the employer assigns the employee an email address is not sufficient. DOL Technical Release 2011-03R.

[13] Treasury Regulations permit electronic delivery of notices and disclosures if a participant has the "effective ability to access" electronic media. Treas. Reg. § 1.401(a)-21.