Statement by

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on behalf of

The ERISA Industry Committee

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INTRODUCTION

Chairman Walberg, Ranking Member Sablan, and Members of the Subcommittee, thank you for holding this important hearing. My name is Erik Sossa, and I am Vice President of Global Benefits and Wellness at PepsiCo, Inc. I have over two decades of experience overseeing the design, administration, and compliance activities for retirement, health, and other benefit plans. For the past five years, I have been responsible for design, governance, and compliance for PepsiCo's retirement and health and wellness plans around the world. Prior to my current role, I have held various roles in benefits and compensation at PepsiCo. Inc. Before coming to PepsiCo, I worked as a consultant serving clients in the areas of retirement and retiree medical programs design and financial management.

I am honored to appear today to discuss retirement security for employees and families on behalf of The ERISA Industry Committee ("ERIC"). ERIC is the only national trade association that advocates exclusively for large employers on employee benefits matters at the Federal, State, and local levels. ERIC advocates for public policies that reduce taxes, mandates, and compliance burdens so that employers can tailor benefits to their unique workforce and provide benefits uniformly to workers and families across the country. ERIC's membership is limited to large employers that sponsor health and retirement plans, so our comments today are solely from that perspective. ERIC's overarching concern is that Federal legislation and regulations continue to provide a robust framework that enable employers with operations in many States to be governed under Federal law — under so-called "ERISA preemption." Today, as requested, I would like to address the importance of removing unnecessary regulatory hurdles so that the resources that employers set aside to provide retirement benefits to their employees can be used as efficiently and effectively as possible.

My testimony today addresses:

- The central role large employers play in the retirement security of millions of Americans and the importance of ERISA preemption;
- Four areas where Congress can take action to support practical solutions that will provide the strongest retirement benefits for employees and their families:
    1. Modernizing and harmonizing rules governing electronic communications with participants in employee benefit plans;

2. Permitting employers to locate so-called “missing” participants using cost-efficient measures and without incurring ongoing costs and increased liabilities for participants who they cannot find despite reasonable efforts;
3. Confirming that employers that sponsor ERISA-governed retirement plans are not also subject to State law regulations or requirements regarding State-mandated retirement plans; and
4. Ensuring that the impact of new regulations or legislation on employer plan sponsors is seriously considered.

LARGE EMPLOYERS PLAY AN ESSENTIAL ROLE IN THE RETIREMENT SECURITY OF MILLIONS OF AMERICANS

ERIC’s members are leaders in advancing Americans’ retirement security and financial wellness and include the largest companies in the country across all sectors of the economy. Employer-sponsored retirement plans cover approximately 90 million active participants.[1] ERIC’s members, alone, provide retirement benefits for tens of millions of Americans. My company, PepsiCo, has eight retirement plans that, combined, cover over 140,000 participants, including a defined benefit plan that remains open to newly-hired hourly-paid workers.

In addition to covering tens of millions of Americans, large employers’ retirement plans offer employees and their beneficiaries superior retirement savings vehicles, especially compared to those that employees or beneficiaries could find on their own. For example, investment options in retirement plans are carefully selected and monitored under a strict, fiduciary standard. These investment options — which often include preferential share classes or fee structures — typically have substantially lower fees than what an individual could obtain on his or her own through an IRA or other individual investment account. In addition, an employer-sponsored plan’s investment options are consistently monitored to ensure that they continue to provide appropriate investment alternatives for the plan’s participants and are replaced when the plans’ fiduciaries conclude that the investment option is no longer appropriate.

[1] U.S. Department of Labor, Private Pension Plan Bulletin Abstract of 2014 Form 5500 Annual Reports, (Sept. 2016), at https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2014.pdf.

The employers that make up ERIC's membership do not see our role as merely setting up a retirement plan and then letting employees sink or swim on their own. Because ERIC's members generally are not in the business of providing retirement or other benefits — for example, my company, PepsiCo, is a leading global food and beverage company — we choose to provide retirement benefits to attract and retain employees and because we want them to be able to enjoy a comfortable retirement. As a result, we remain invested in our employees' retirement security — and their overall financial wellness — from the day they start work until they no longer are entitled to any benefits from our plans. We provide high-quality education to encourage our employees to save smartly. In many cases, we directly contribute to employees' retirement accounts through matching or other employer contributions. We also seek innovative solutions to help our employees with pressing retirement issues, for example, looking for ways to help employees avoid outliving their retirement savings.

Employers' successful ability to provide these benefits is directly related to the strength of the Employee Retirement Income Security Act of 1974 ("ERISA") — the primary statute governing employer-sponsored retirement plans. In enacting ERISA, Congress sought to ensure that benefit commitments were honored — but also to avoid imposing obligations that would discourage employers from adopting or maintaining retirement plans. By establishing that these retirement plans are governed exclusively by federal law, ERISA allows employers to provide uniform benefits and uniform plan administration even if their workforce is scattered over the many State and local jurisdictions. Congress expressly sought to prevent a patchwork of State regulation that would be more costly than a uniform national system and a disincentive for employers to provide retirement benefits.[2]

PRACTICAL REGULATIONS ENABLE EMPLOYERS TO PROVIDE THE BEST POSSIBLE BENEFITS FOR THEIR EMPLOYEES

Everyone with an interest in retirement plans — employers, employees and their dependents and beneficiaries, Congress, and regulators — can agree that resources set aside for employees' retirement benefits should be used as efficiently and effectively as possible. While ERIC recognizes the need for rules to prevent abuses and to ensure that benefits are distributed in

[2] *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987); *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990).

a nondiscriminatory manner, Congress should look to eliminate unnecessarily burdensome rules that divert funds from employees' retirement benefits.

Today, I want to take this opportunity to discuss four examples where Congress can take action to facilitate the efficient and effective delivery of high-quality benefits to millions of employees and their dependents and beneficiaries:

1. Modernize and Harmonize Rules Governing Electronic Communications with Participants in Employee Benefit Plans

Employee benefit plans are currently subject to regulations that hinder electronic communications with their participants. These rules should be modernized, so that paper documents are sent only to people who do not have Internet access or who indicate a preference to receive paper communications in the mail. By eliminating hurdles to sending electronic communications to other plan participants, retirement plans will eliminate a major source of waste — and, in the process, enhance the quality of communications.

Currently, the main Department of Labor ("DOL") regulation governing communications with employee benefit plan participants establishes a default rule that favors paper communications and restricts an employer's ability to use electronic disclosure. Under this regulation, only workers who regularly have access to computers as part of their job, or who have given their affirmative consent in advance, may receive electronic disclosures.[3] Otherwise, employers are required to print documents and mail paper communications. Similarly, certain IRS regulations require reports and statements to be made in paper form, unless the recipient affirmatively consents to receiving electronic disclosures.[4]

These rules largely were established in a different environment than today. For example, the DOL regulation governing electronic disclosure was issued in 2002. The world was a different place then. Internet access and use of electronic devices that can access electronic

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[3] *See* 29 CFR §2520.104b-1(c)(2).

[4] *See* Treas. Reg. §1.6050S-2 (qualified tuition reimbursement and refund reports); Treas. Reg. §1.36B-5 (health insurance exchange annual statements).

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communications are far more widespread today and continue to grow at an extraordinary pace.[5] In particular, the use of smartphones and tablets has exploded in recent years — in 2016, 74% of Americans ages 50-64 were smartphone owners (a 27% increase from 2015), as were 64% of Americans in households earning less than $30,000 per year (a 23% increase from 2015).[6] As a result of this growing access and use, Americans increasingly have grown accustomed to receiving and reviewing important information electronically — including information about employer-sponsored retirement plans, as well as other employer initiatives related to their financial wellness. Regulations that put a thumb on the scale of sending paper communications no longer reflect Americans' preferred vehicles for communication.

Modernizing these regulations can result in significant cost-savings. As just one example, large employers' retirement plans commonly have tens or even hundreds of thousands of participants. For these plans, the cost of printing and mailing required communications, alone, can cost hundreds of thousands of dollars a year. Limiting paper communications only to plan participants that prefer hard copies or lack Internet access can free up substantial resources that then can be redirected back to employees.

In many instances, these savings can accrue directly to participants. Under ERISA, expenses borne by employer-sponsored retirement plans can either be paid by the employer or charged to participants in the plans. While PepsiCo currently bears the cost of these communication, we are aware that other employers charge plan participants the reasonable costs of these communications. In those cases, reducing the costs associated with participant communications would result directly in lower fees for participants.

In addition to cost savings, modernizing electronic communication rules can enhance the quality of the communications themselves and enable employees to have easier access to relevant documents. Electronic disclosures can include user-friendly and helpful interactive features, such as search functions or links to referenced documents, that can help participants better understand the materials. Updates to electronic documents can be made more rapidly and will generally get to recipients faster than paper. Once received, electronic disclosures can be

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[5] *See, e.g., "Record shares of Americans now own smartphones, have home broadband,"* http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/, Pew Research Center (January 12, 2017).

[6] *See id*.

more accessible, as they always can be at an employee's disposal from a computer or mobile device.

To realize these advantages and to more accurately reflect Americans' preferences, Congress should abolish the paper default requirement and establish a new rule that would provide employers with flexibility to provide electronic communications with appropriate safeguards — that would apply with respect to all communications concerning employee benefit plans and tax-qualified savings vehicles.

To be most effective, the new rule could work as follows:

- If the employer has a benefit plan participant's personal email address, the employer may use electronic communications, subject to the participant's right to opt-out and request paper communications.
- If the employer has the participant's employer-provided email address only, the employer may use electronic communications only if the participant has access to email at their place of work (again subject to the individual's right to opt-out and request paper communications).
- If the employer does not have the recipient's e-mail address, the recipient would continue to receive paper communications — unless the participant subsequently provides an email address so that he or she can receive electronic communications.

This rule reflects a common-sense approach to electronic disclosures. Employers should no longer be required to follow an out-of-date default rule that favors sending hard copies. Individuals who want paper communications will be incentivized to request them — and employers would honor those requests. By contrast, under the current rules, individuals who prefer electronic communications may settle for paper communication because of the affirmative steps needed to request electronic disclosures. As recognized by the DOL in analogous contexts, such forces of inertia and bias toward the status quo often run counter to the best interests of workers.[7] This proposed rule would overcome this inertia to make it more likely that plan participants will receive communications in their preferred format.

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[7] *See* Preamble to Default Investment Alternatives Under Participant Directed Individual Account Plans, Fed. Reg., Vol. 72, No. 205, p. 60451; *see also* Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, Fed. Reg., Vol. 75, No. 116, p. 34537.

2. Permit Employers to Locate So-Called "Missing" Participants Using Cost-Efficient Measures and Without Incurring Ongoing Costs and Increased Liabilities for Participants Who they Cannot Find Despite Reasonable Efforts

Employers that sponsor retirement plans often undergo extensive efforts to connect with individuals who might be owed a benefit under the plan but either cannot be found or do not respond to communications. Rules that govern attempts to locate such so-called "missing participants" are of a significant concern to ERIC's members who through no fault of their own can be subject to potentially serious liability.

Although plans of all sizes deal with missing participant issues, large employers, in particular, often face substantial challenges related to missing participants. Given the size and duration of large employers' retirement plans (many ERIC members have plans that were established more than five decades ago — for example, one of PepsiCo's principal pension plan was established in 1943), even the most meticulously administered retirement plans can end up with hundreds or even thousands of missing participants. For example, workers with modest benefits may not think to update their former employer with a current address. Similarly, people who worked for the company a long time ago may not realize that they have benefits and, accordingly, may not provide their former employer with updated contact information. Moreover, many large employers have long histories of corporate mergers and acquisitions. Plan administrators may inherit new participant rosters with incomplete records for former employees of predecessor companies and in some cases, will not have sufficient information to even identify, let alone track down and get a response from, missing or nonresponsive participants.

Compounding these challenges, employers must navigate existing regulations that are vague but, nevertheless, can result in substantial penalties. Under ERISA, retirement plans have fiduciary responsibilities to try to locate missing participants. The DOL has provided no guidance as to what steps are needed to satisfy this obligation, aside from narrow guidance for locating missing participants when a defined contribution plan is terminated (the "DC Plan

Termination Guidance")[8] — but nevertheless engages in significant enforcement activities that could result in serious penalties.[9] Accordingly, ongoing employee benefit plans may reasonably conclude that they must undertake excessive and costly efforts to locate plan participants, including the use of commercial locator services or credit reporting agencies contemplated in the DC Plan Termination Guidance to locate each missing participant.

Similarly, IRS regulations require plans to make "reasonable efforts" to find missing participants — but fail to provide meaningful guidance as to what this means.[10] Failure to meet this vague standard can result in significant adverse tax consequences,[11] which again may compel plans to undertake extraordinary efforts to try to track down missing participants.

Given this murky regulatory environment, Congress should encourage regulators — or provide legislation — to clarify what constitutes a reasonable — and cost-effective — search for missing participants sufficient to satisfy the legal responsibilities of employer plan sponsors. For example, it could be clarified that a reasonable search consists of a plan sending a form notice multiple times to the last known physical and email address of the participant and his or her beneficiary. If a plan performs this reasonable search and the participant still cannot be found (or remains unresponsive), the obligation to search for the missing participant should be deemed satisfied, such that neither the employer, the plan, nor the plan's fiduciaries would be subject to any penalty or liability. After completing this reasonable search, a defined benefit retirement

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[8] *See* U.S. Department of Labor, Field Assistance Bulletin No. 2014-01(Aug. 14, 2014), at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2014-01.

[9] *See* ERISA § 409(a) (imposing personal liability, restitution, disgorgement of profits, and "such other equitable or remedial relief as the court may deem appropriate" as remedies for a fiduciary breach).

[10] *See* IRS Clarifications to Instructions for Lines 4I of Schedules H and I (Form 5500) and line 10f of Form 5500-SF, https://www.irs.gov/retirement-plans/clarifications-to-instructions-for-lines-4l-of-schedules-h-and-i-form-5500-and-line-10f-of-form-5500-sf; *see also* I.R.S. Rev. Proc. 2016-51 (Sept. 29, 2016).

[11] Failing to satisfy this standard arguably could be deemed a failure to meet requirements to make distributions upon a "required beginning date" under Code § 401(a)(9), which, in turn, could lead to plan disqualification. *See* Fixing Common Plan Mistakes-Failure to Timely Start Minimum Distributions, https://www.irs.gov/retirement-plans/plan-sponsor/fixing-common-plan-mistakes-failure-to-timely-start-minimum-distributions.

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plan also should be relieved of any requirement to pay PBGC premiums associated with the missing participant.

In addition, once the search is completed, a retirement plan should be permitted — but not required — to transfer the missing participant's account, so that the plan would be relieved from the further recordkeeping and administration costs associated with the account. Any of the following options, alone or in combination, would be proper recipients for this transfer:

- The PBGC, the Social Security Administration, or other Government Agency. The PBGC currently holds funds associated with missing participants in certain terminated plans and maintains an online registry that allows individuals to run searches to see if they are entitled to any of the assets.[12] This program could be expanded to include missing participants in ongoing retirement plans — or a similar program could be set up in another government agency like the Social Security Administration. In addition, a broader online registry could be established that would empower individuals to locate their own missing benefits, using a legislative proposal from last Congress as a starting point.[13]
- The Plan's Forfeiture Account. Congress or regulators could confirm that a plan may transfer the benefits of a missing participant to the plan's forfeiture account, provided that the benefit would be restored if and when the missing participant or beneficiary claimed the benefit.
- IRA Rollover. Congress or regulators could expand current laws or rules,[14] so that plans could roll over the benefits of missing participants into an individual retirement arrangement, regardless of the size of the benefit.
- Federally Insured Bank Account. Congress or regulators could authorize transfer of missing participants' benefits to a federally-insured bank account in the name of the missing participant. The participant would have an unconditional right to withdraw funds from this account.

[12] *See generally PBGC Missing Participant Program*, https://www.pbgc.gov/prac/terminations/missing-participants.
[13] *See* Retirement Savings Lost and Found Act of 2016, S. 3078, 114th Cong. (2016).
[14] Under current law, a plan terms can require cash distributions of benefits less than $5,000, and generally, if a participant is non-responsive, the plan can roll those distributions into an IRA. *See* Code § 411(a)(11); Code § 401(a)(31); 29 C.F.R. § 2550.404a-2.

- State Unclaimed Property Funds. Plans could be permitted to send the benefits of missing participants to State unclaimed property funds.

Any of these options would allow a missing participant's benefits to be restored, while at the same time ensuring that the employer does not continue to incur the expense and additional liability for maintaining the account of a participant who has not and might never reclaim their benefits.

3. Confirm that Employers that Sponsor Retirement Plans are not Subject to State Law, Regulations, or Requirements of State-Mandated Retirement Plans

ERIC recognizes that, for many Americans, there is a looming retirement crisis in our country, and we strongly encourage efforts to increase access to retirement plans — including efforts by States. At the same time, these efforts should not impose additional obligations on employers who are providing retirement plans.

Employers operate retirement plans under a long and well-established principle that Federal law preempts any State's effort to impose rules and regulations on employee benefit plans. As noted earlier, this is one of the hallmarks of ERISA,[15] and it remains a critical feature for large employers like PepsiCo that have employees in all 50 states and that would not be able to provide benefits effectively if subjected to numerous State requirements.

Efforts by States to create their own retirement plans risk are undermining this core tenet of ERISA. Recently, seven States have passed legislation to implement their own retirement plans. Such legislation can result in new obligations for employers, over and beyond — and in conflict with — what is required under ERISA. For example, Oregon, the first State so far to publish final rules regarding a State-run retirement plan, will require large employers to compile and report information requested by the State every three years. As proposed, Oregon's rule would have required the enrollment of employees into the employer's retirement plan within 90 days of hire — a requirement contrary to ERISA.

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[15] *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans.").

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ERIC applauds Congress's recent action under the Congressional Review Act to curtail these programs.[16] However, we remain concerned that without stronger guidance from Congress or the DOL, States will continue to implement their own programs that violate the preemption clauses of ERISA. Accordingly, ERIC has urged the Secretary of Labor to use any and all enforcement tools at his disposal to support the preemption clauses of ERISA and protect plan sponsors from burdensome compliance activities that States might impose. Congress should take complementary action to ensure that employers' retirement plans continue to remain subject to uniform rules and standards — and not to a patchwork of State requirements.

4. Ensure that Employer Retirement Plan Sponsors are Engaged in the Process of Introducing and Implementing Any New Regulation or Legislation

Given the complexities of ERISA, new regulations or legislation — no matter how well-intentioned — pose a risk that unnecessary cost and compliance burdens will be imposed on employer-sponsored plans without commensurate benefits to employees. Such risks are enhanced when regulations or legislation are introduced without serious consideration of the views of the employers who provide such benefits.

The Obama-administration DOL's advanced notice of proposed rulemaking concerning lifetime income disclosure regulations (the "Proposed LID Regulations),[17] along with the companion Lifetime Income Disclosure Act, S. 1317 ("LIDA") that was approved by the Senate Finance Committee in November 2016, are examples of well-intended regulation and legislation that were developed without regard to the impact on the employer sponsor community — resulting in proposals that would impose unnecessary burdens on plan sponsors and needless complexity and confusion for plan participants. Specifically, both mandate that employers calculate, describe and disclose to participants in a specific way, annuity benefits that likely are not available under their own their retirement plans.

In addition, even rules that are not directed at regulating the plan sponsor community can create new costs on plan sponsors and unnecessary confusion for employers and employees. For

[16] *See* Joint Resolution 66 (effectively repealing the DOL's rule on state-run auto-IRA programs).

[17] *See* 29 CFR Part 2520, 78 Fed. Reg. 26727.

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example, the so-called "fiduciary conflict rule," while not intended to confer investment fiduciary status on sponsors of retirement plans,[18] has injected uncertainty among employers as to the measures needed to monitor actions taken by service providers in response to this regulation.

To address such costs and complexities, which may not be readily apparent to those outside of the plan-sponsor community, ERIC urges the Committee to do all it can the ensure that plan sponsor views on new regulations and legislation are solicited in advance and seriously considered. Among other things, ERIC would look forward to working with Congress and regulators to develop policy proposals that increase retirement savings and encourage offerings of lifetime income products, including the use of annuities — but without mandates on employers that sponsor retirement plans.

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CONCLUSION

Thank you again for the opportunity to submit testimony on this important issue. I applaud Members of the Subcommittee for focusing on the critical task of seeking ways to reduce regulatory burdens that can negatively impact retirement savings. I hope my testimony will be helpful in developing common-sense legislation that will do that without weakening the rules needed to protect the interests of American workers and their families.

ERIC stands ready to work with Congress to enact legislative changes that will support practical regulation to strengthen the employer-sponsored retirement system and improve delivery of retirement benefits to employees and their beneficiaries. If ERIC can be of further assistance, please do not hesitate to contact Will Hansen, Senior Vice President, Retirement Policy, at whansen@eric.org or (202) 627-1930.

[18] *See* 81 Fed. Reg. at 20965.