INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

STATEMENT

OF

PAUL SCHOTT STEVENS
PRESIDENT & CEO
INVESTMENT COMPANY INSTITUTE

BEFORE THE

US HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

ON

ENHANCING RETIREMENT SECURITY: EXAMINING PROPOSALS TO SIMPLIFY AND MODERNIZE RETIREMENT PLAN ADMINISTRATION

MAY 16, 2018

EXECUTIVE SUMMARY

The key points covered in the body of my statement are summarized below.

I. While there is opportunity for improvement, the US retirement system is helping millions of Americans achieve a secure retirement.

Efforts to strengthen the retirement system should be guided by an understanding of how the current system works and the evidence showing that it works well.

- Relying on the complementary components of Social Security, homeownership, employer-sponsored retirement plans, individual retirement accounts (IRAs), and other assets, the American retirement system is working for the majority of American workers and has grown stronger in recent decades.
- Assets specifically earmarked for retirement have increased significantly over time and the majority of private-sector workers needing and demanding access to pensions as part of their compensation have pension plan coverage.
- The flexibility built into the voluntary employer-provided retirement system has led to numerous innovations that benefit savers and decreasing costs for retirement plan products and services over time.
- The current retirement-savings tax incentives are crucial to the effectiveness of the US retirement system and Congress should maintain and strengthen these incentives.

II. Targeted changes building on the strengths and successes of the current national system would reduce cost and increase access.

The statement focuses on two proposals under consideration today—"open MEPs" (H.R. 854) and electronic delivery (H.R. 4610)—that would break new ground in improving access to retirement savings plans and increasing efficiency within the system.

- H.R. 854 provides a common-sense bipartisan solution to increasing coverage—open MEPs. Allowing small employers to participate in a single, multiple-employer ERISA plan—regardless of the employer's industry or any other preexisting relationship with other participating employers or the plan sponsor—will reduce administrative and compliance costs and burdens, and ultimately improve the availability of retirement plans to employees of small employers. In addition, by providing a level of liability relief for investment options offered under the plan, small employers would be encouraged to participate in a MEP, while at the same time ensuring that plan participants are protected by ERISA.

- The time has come to modernize and make consistent rules for electronic delivery of plan information to participants and beneficiaries. The rules for using electronic delivery must be updated to reflect the dramatic and advantageous evolution in technology, and its expanding availability, over the past decade. Through H.R. 4610, Congress should permit electronic delivery as the default method for disclosure (while still allowing participants to opt for paper). H.R. 4610 will enhance the effectiveness of ERISA communications, maintain security of information, and produce significant cost savings for 80 million retirement investors. ICI and the American Retirement Association recently co-commissioned a study, attached, showing a compelling and urgent need to shift the default method to electronic.

- Beyond expanding the use of MEPs and electronic delivery of plan information, additional changes outlined in our statement will foster innovation and growth in the voluntary employer-sponsored retirement plan system. A detailed attachment describes policies supported by the Institute that would improve access to retirement savings opportunities and make retirement plans more efficient and effective. These reforms would build upon the current system by expanding coverage, participation, and savings rates in DC plans and IRAs; improving the delivery and quality of information and education to plan participants and plan sponsors; enhancing flexibility in determining how and when to tap retirement savings; and eliminating unnecessary burdens in plan administration so that plans can function more effectively.

I. INTRODUCTION

My name is Paul Schott Stevens. I am President and CEO of the Investment Company Institute.[1] I am pleased to appear before the Subcommittee on Health, Employment, Labor, and Pensions today as it considers a topic of great importance, "Enhancing Retirement Security: Examining Proposals to Simplify and Modernize Retirement Plan Administration." I will focus, in particular, on proposals that would facilitate the use of so-called "open MEPs" and enhance the effectiveness of retirement plan communications by expanding the use of electronic delivery. Chairman Walberg and Ranking Member Sablan, thank you for this opportunity to share our views and for the attention that you and your colleagues are paying to issues so critical to American retirement savers.

Thanks in no small part to Congress's efforts to promote retirement savings, Americans currently have $28.2 trillion earmarked for retirement, with more than half of that amount in defined contribution (DC) plans and individual retirement accounts (IRAs).[2] About half of DC plan and IRA assets are invested in mutual funds, which makes the mutual fund industry especially attuned to the needs of retirement savers.

Under the framework of a voluntary system, Congress has made available the tax structure and savings vehicles necessary to promote savings by American workers, and the competitive private marketplace has provided innovative products and services at increasingly lower costs.[3]

We commend this Subcommittee for considering proposals intended to enhance the successful DC plan system. ICI agrees that, even with the many successes of the US retirement system, we should always be open to considering ways in which that system can be strengthened further to help even more Americans achieve a secure retirement. For its part, the Institute has been vocal in its support for policies that would improve access to retirement savings opportunities and make retirement plans more efficient and effective—including permitting "open" multiple employer plans (MEPs) and greater use of electronic delivery. Reforms like these will build upon the strengths of the current system and recognize the important role that the private marketplace plays in its support.

---

[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$21.7 trillion in the United States, serving more than 100 million US shareholders, and US$7.5 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] At the end of the fourth quarter of 2017, US retirement assets totaled $28.2 trillion, DC plan assets were $7.7 trillion, and IRA assets were $9.2 trillion. Investors held $4.3 trillion of IRA assets and $4.5 trillion of DC plan assets in mutual funds. See Investment Company Institute, *The US Retirement Market, Fourth Quarter 2017* (April 2018), available at www.ici.org/info/ret_17_q4_data.xls.

[3] See note 15, infra.

My testimony today focuses on two key points: First, I will discuss the strengths and successes of the US retirement system and the important role that the private marketplace plays. In this respect, consideration of proposals aimed at strengthening the US retirement system are best guided by a clear understanding of Americans' retirement prospects and the role that the current system plays in helping American workers reach their retirement goals.

Second, my testimony will describe targeted reforms at the national level that would help bring more employers into the system and generate better outcomes for retirement savers—importantly without detracting from the system's effective features. I will focus my testimony on two critical reform measures under this Subcommittee's consideration: One proposal, set forth in H.R. 854, the Retirement Security for American Workers Act, introduced by Reps. Vern Buchanan (R-FL), Richard Neal (D-MA), James Renacci (R-OH) and Ron Kind (D-WI), would allow employers to participate in a single, multiple-employer plan (often referred to as a "MEP") under the Employee Retirement Income Security Act of 1974 (ERISA)—regardless of the employer's industry and any other preexisting relationship with other participating employers or the plan sponsor. These "open MEP" arrangements will reduce administrative and compliance costs and burdens for employers, and ultimately improve the availability of retirement plans to employees of small employers. The other proposal, H.R. 4610, the Receiving Electronic Statements To Improve Retiree Earnings Act, introduced by Reps. Jared Polis (D-CO), Phil Roe (R-TN), Ron Kind (D-WI) and Mike Kelly (R-PA), which would allow plan sponsors to make e-delivery the default method for communicating with participants (but allow participants to opt for paper), will enhance the effectiveness of ERISA communications, maintain security of information, and produce cost savings for the economy and plans that decide to opt for e-delivery.

II. THE US RETIREMENT SYSTEM IS HELPING MILLIONS OF AMERICANS ACHIEVE A SECURE RETIREMENT

Retirement policy discussions often start from the premise that retirees' pension income has fallen over time. Contrary to this conventional wisdom, private-sector pension income has become more, not less, prevalent and substantial over time. Since the enactment of ERISA, increasing numbers of retirees receive benefits from private-sector pension plans (DB and DC) and receive more in benefits from these plans.

- **While there is opportunity for improvement, the retirement system is working for millions of American workers.** A wide range of work by government, academic, and industry researchers who have carefully examined Americans' saving and spending patterns, before and after retirement, shows that the American system for retirement saving is working for the majority of American workers and has grown stronger in recent decades. Assets specifically earmarked for retirement have increased significantly over time. Adjusted for inflation and growth in the number of households, retirement assets were more than seven times the level at year-end 2017 than at year-end 1975.[4]

- **The US retirement system relies upon the complementary components of Social Security, homeownership, employer-sponsored retirement plans (both DB plans and DC plans offered by both private-sector and government employers), IRAs (both contributory and rollover), and other assets.** In retirement, different households will depend on each of these components in differing degrees, subject to overall saving levels, work history, and other factors. For most households, however, employer-sponsored retirement plans are crucial: about eight in ten near-retiree households have retirement assets (DC plans or IRAs), DB benefits, or both.[5] And, recent joint research by ICI and Internal Revenue Service (IRS) economists,[6] in addition to research by Census Bureau economists,[7] confirm that income from these plans is widespread among retirees. The joint ICI and IRS research shows that most individuals in the study were able to maintain spendable income after claiming Social Security, and lower-income individuals typically had higher replacement rates.[8] The median worker in the study replaced 103 percent of spendable income after claiming Social Security and the median worker in the lowest quintile of income replaced 123 percent. Thanks to this multi-faceted system, successive generations of American retirees have been better off than previous generations.[9]

- **The significance of Social Security must be considered in any assessment of the US retirement system.** Social Security provides the foundation of retirement security for almost all American workers and it replaces significant portions of income for lower-income retirees. In this respect, Social Security replaces 83 percent of average inflation-indexed annual earnings for workers in the lowest lifetime household earnings quintile; 54 percent for workers in the middle quintile; and 33 percent for workers in the highest quintile.[10] Yet the Social Security

---

[4] See Figure 4, p. 11 (updated to year-end 2017), in Brady, Burham, and Holden, *The Success of the US Retirement System*, Investment Company Institute (December 2012), available at www.ici.org/pdf/ppr_12_success_retirement.pdf.

[5] See Figure 8.4, p. 167, in Investment Company Institute, *2018 Investment Company Fact Book* (2018); available at www.ici.org/pdf/2018_factbook.pdf. Near-retiree households are working households aged 55 to 64.

[6] See Brady, Bass, Holland, and Pierce (April 2017), "Using Panel Tax Data to Examine the Transition to Retirement," available at www.ici.org/pdf/ppr_17_brady_tax_panel_data.pdf.

[7] See Bee and Mitchell (July 2017), "Do Older Americans Have More Income Than We Think?" available at www.census.gov/content/dam/Census/library/working-papers/2017/demo/SEHSD-WP2017-39.pdf.

[8] See Brady, Bass, Holland, and Pierce (April 2017), "Using Panel Tax Data to Examine the Transition to Retirement," available at www.ici.org/pdf/ppr_17_brady_tax_panel_data.pdf.

[9] See discussion, pp. 10–14, in Brady, Burham, and Holden, *The Success of the US Retirement System*, Investment Company Institute (December 2012), available at www.ici.org/pdf/ppr_12_success_retirement.pdf.

[10] Figures represent the mean replacement rates for retired workers in the 1960s birth cohort, assuming the workers claim Social Security benefits at age 65. See Figure 8.3, p. 166, in Investment Company Institute, *2018 Investment Company Fact Book* (2018); available at www.ici.org/pdf/2018_factbook.pdf. If these workers delay claiming benefits until age 67 (their

system faces a projected long-term imbalance.[11] It is absolutely imperative to preserve Social Security as a universal, employment-based, progressive pension for all Americans.[12]

- **Effective policymaking requires a better understanding of the "coverage gap."** Discussions about pension plan coverage often rely on misleading or incomplete coverage statistics. The fact is that the majority of workers needing and demanding access to pensions as part of their compensation participate in an employer-sponsored retirement plan.[13] Efforts to expand coverage will be more successful if policymakers better understand the reasons underlying why specific populations are not participating in retirement savings vehicles. In this regard, research suggests that small employers may be less likely than large employers to sponsor plans because a small employer is more likely to have lower-income, younger employees who are less likely to be focused on saving for retirement.[14]

- **The voluntary employer-provided retirement system is characterized by flexibility, competition, and innovation.** A strength of the voluntary employer-sponsored retirement system is the flexibility built into its design. Combined with competition—among employers to

---

full benefit retirement age), replacement rates would increase to 96 percent for workers in the lowest quintile of lifetime household earnings; 62 percent for workers in the middle quintile; and 39 percent for workers in the highest quintile.

[11] For projections related to these programs, see The Board of Trustees, Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, *The 2017 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds* (July 2017), Washington, DC: US Government Printing Office, available at www.ssa.gov/oact/tr/2017/tr2017.pdf; The Boards of Trustees, Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, *2017 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds* (July 2017), Washington, DC: Centers for Medicare and Medicaid Services, available at www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/Downloads/TR2017.pdf; Congressional Budget Office, *The 2017 Long-Term Budget Outlook* (March 2017), available at www.cbo.gov/system/files/115th-congress-2017-2018/reports/52480-ltbo.pdf; and Social Security Administration, "Detailed Reports on the Financial Outlook for Social Security's Old-Age, Survivors, and Disability Insurance (OASDI) Trust Funds" (2017), available at www.ssa.gov/OACT/tr/index.html.

[12] Regardless of the form they take, changes to Social Security will likely increase the importance of employer-sponsored retirement plans and IRAs to provide for retirement adequacy. If Social Security benefits are cut, future retirees will need to accumulate more retirement resources. If taxes are raised on workers, net earnings will fall, but the amount of earnings that would need to be set aside to supplement Social Security benefits in retirement would remain largely unchanged. To the extent that either the benefit cuts or tax increases are structured to exempt workers with low lifetime earnings, it would place an even heavier burden on those already most dependent on employer-sponsored retirement plans and IRAs. For a discussion of how different methods of cutting Social Security benefits would impact workers with different levels of lifetime income, see Brady, "Measuring Retirement Resource Adequacy," *Journal of Pension Economics and Finance* 9, no. 2 (April 2010): pp. 235–262.

[13] See Brady and Bass, "Who Participates in Retirement Plans, 2014," *ICI Research Perspective* 24, no. 1 (April 2018); available at www.ici.org/pdf/per24-01.pdf.

[14] See Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014); available at www.ici.org/pdf/per20-06.pdf.

offer attractive benefits packages that include retirement plans, and among financial services firms to provide services to those plans—this flexibility has led to tremendous innovation in retirement plan design over the past few decades and to continually lower costs for retirement products and services.

- **Retirement plan sponsors and investors are cost conscious and 401(k) plan assets tend to be concentrated in lower-cost mutual funds, as 401(k) plan services have expanded.** The cost of 401(k) plans has fallen over time. Fees paid on mutual funds in particular have trended down over the past two decades—both on mutual funds invested in 401(k) plans and industrywide—and investors tend to concentrate their assets in lower-cost funds.[15] For example, since 2000, expense ratios that 401(k) plan participants incurred for investing in equity, hybrid, and bond mutual funds have decreased by 38 percent, 26 percent, and 43 percent, respectively; and in 2016, 401(k) plan participants incurred an asset-weighted average expense ratio of 0.48 percent for equity mutual funds.[16] In addition, employers sponsoring 401(k) plans and their financial services providers have worked together to automate and simplify the enrollment process, expand the range of investment options, expand the services provided by the plans, and broaden the array of educational materials offered participants.

- **The current tax structure—including allowing the deferral of tax on compensation contributed to employer-sponsored retirement plans—provides a strong and effective incentive for individuals at all income levels to save for retirement and, by providing significant tax benefits to American workers of all income levels, encourages employers to sponsor plans.** Of course, any changes in the retirement tax incentives could dramatically affect a prior decision to sponsor a plan and require employers to reevaluate and potentially redesign their retirement plan offerings, or even to decide to eliminate their plans entirely. Consistent with the views of the overwhelming majority of Americans,[17] we urge Congress to maintain the

---

[15] See Collins, Holden, Duvall, and Chism, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2016," *ICI Research Perspective* 23, no. 4 (June 2017); available at www.ici.org/pdf/per23-04.pdf. Competition and a growing asset base have contributed to the success of 401(k) plans by reducing plan costs, resulting in cost-effective investing for 401(k) participants. For an analysis of the "all-in" fees of 401(k) plans, based on in-depth surveys of plan sponsors, see Deloitte Consulting LLP and Investment Company Institute, *Inside the Structure of Defined Contribution/401(k) Plan Fees, 2013: A Study Assessing the Mechanics of the "All-In" Fee,"* New York: Deloitte Consulting LLP and Washington, DC: Investment Company Institute, available at www.ici.org/pdf/rpt_14_dc_401k_fee_study.pdf. For analysis of "total plan cost," based on Form 5500 and industry data, see BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2015*, San Diego, CA: BrightScope and Washington, DC: Investment Company Institute, available at www.ici.org/pdf/ppr_18_dcplan_profile_401k.pdf. For insight into the changing services and educational materials provided by 401(k) plans, see Plan Sponsor Council of America member surveys.

[16] See Collins, Holden, Duvall, and Chism, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2016," *ICI Research Perspective* 23, no. 4 (June 2017); available at www.ici.org/pdf/per23-04.pdf.

[17] See Figures 2 and 3 in Holden, Schrass, Seligman, and Bogdan, "American Views on Defined Contribution Plan Saving, 2017," *ICI Research Report* (February 2018); available at www.ici.org/pdf/ppr_18_dc_plan_saving.pdf.

current retirement-savings tax incentives, including the contribution limits, and other features that successfully encourage millions of Americans to accumulate savings during their working lives and therefore generate adequate income in retirement.

III. TARGETED CHANGES TO THE CURRENT NATIONAL SYSTEM WOULD REDUCE COST AND INCREASE ACCESS

A. Allowing Multiple Small Employers to Band Together to Offer Retirement Plans Is a Common-Sense Bipartisan Solution

H.R. 854 would ease restrictions on "open" MEPs, allowing unrelated employers to pool assets and participants under a single DC plan. The Institute supports the open MEP concept, especially for employers with fewer than 100 employees—the employer segment most in need of solutions to encourage retirement plan sponsorship.[18]

Small businesses often face particular challenges in establishing and maintaining retirement plans. Studies have found that concern about administrative costs and burdens are a significant reason that more small businesses do not offer retirement plans. Small employers maintaining their own plan are required to prepare their own plan documents, summary plan descriptions and other participant disclosures, file individual Form 5500s, obtain a separate financial audit, and establish a single trust. Because of the fixed administrative costs of sponsoring a plan, small plans may not qualify for lower cost investment options or lower recordkeeping fees. In addition to administrative and compliance burdens, smaller employers may be challenged by the fiduciary responsibility and liability of selecting and monitoring service providers and plan investment options.

1. Existing rules prevent effective use of MEPs

Current legal impediments preclude small employers from banding together to participate in a single retirement plan maintained by a single service provider, and thus prevent small employers from gaining the same efficiencies that larger employers enjoy. These efficiencies come in the form of reduced compliance and administrative burdens (e.g., a single Form 5500, and a single vendor relationship to manage).

[18] According to the National Compensation Survey (March 2017), 55 percent of workers at employers with fewer than 100 workers are covered by a pension plan (DB, DC, or both), while 85 percent of workers at employers with 100 workers or more are covered by a pension plan (DB, DC, or both). The survey is available at: www.bls.gov/ncs/ebs/benefits/2017/ownership/civilian/table02a.htm. For a discussion of how pension coverage varies by plan size, see Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf.

Department of Labor (DOL) guidance essentially has foreclosed the operation of retirement plans covering groups of unrelated employers under ERISA.[19] This guidance generally provides that for a single ERISA plan to exist, the employers that participate in the plan must be tied together by a common economic interest or organizational relationship unrelated to the provision of benefits. To the extent there is no such relationship, each participating employer is treated as establishing and maintaining a separate employee benefit plan for its own employees.

In addition, employers are discouraged from joining a multiple employer plan by the Internal Revenue Code ("Code"), which provides that violations of tax-qualification requirements by one participating employer could disqualify the entire plan.[20] Under the so-called "one bad apple" rule, a violation of the Code's tax-qualification requirements by one participating employer in a multiple employer plan could result in disqualification of the entire plan for all participating employers. For example, if one participating employer in a multiple employer plan fails to satisfy the top-heavy rules, then the multiple employer plan may be disqualified for all of the employers in the plan.

2. H.R. 854 would eliminate many of these barriers and encourage employers to join MEPs

H.R. 854 would allow otherwise unrelated employers to band together and participate in open MEP arrangements (referred to in the bill as "pooled employer plans"). The bill also includes important safeguards for open MEP arrangements to ensure the legitimacy of the sponsoring entity and adherence to ERISA fiduciary standards. Key legal protections for plan participants would be as follows:

- Employers would transfer fiduciary responsibility for selecting and monitoring plan investment options to the pooled plan provider, who would be the "named fiduciary."

- Participating employers in the pooled employer plan would retain fiduciary responsibility for the selection and monitoring of the pooled plan provider "named fiduciary." Importantly, as noted above, participating employers would be relieved of the liability for selecting and monitoring the particular investment options (as long as that responsibility is delegated to another fiduciary by the pooled plan provider)—an important incentive to join a pooled employer plan and offer a retirement plan to employees.

- The pooled plan provider would be required to acknowledge in writing that he is a fiduciary to the plan. The pooled plan provider, or its designee, would also be required fulfill the role of the

[19] See DOL Advisory Opinions 2012-03A and 2012-04A (guidance analyzing when an entity may establish a single ERISA plan that covers multiple employers). Most of the guidance addresses associations, but some addresses other types of organizations (e.g., financial institutions, franchises, employee leasing and professional service organizations).

[20] In contrast to DOL guidance requiring a common interest or relationship between the participating employers, Code section 413(c) provides special tax-qualification rules that accommodate plans sponsored by two or more employers that are not in the same controlled group or otherwise related. Under these rules, employers participating in the multiple employer plan are treated as one employer for certain purposes (e.g., minimum participation testing; vesting) and as separate employers for certain other purposes (e.g., nondiscrimination and minimum coverage testing; deduction rules).

plan's "administrator," which means it ultimately would be responsible for all ERISA statutory disclosure responsibilities. The named fiduciary could delegate recordkeeping and other administrative functions to another entity.

- The pooled plan provider would be required to register with DOL and provide any information required by DOL, including submitting to audits, examinations or investigations by DOL to enforce compliance with legal requirements for pooled plan providers.

- The plan would be prohibited from subjecting participating employers to unreasonable restrictions or fees, or any penalties, that restrict participating employers' ability to cease participation in, or transfer assets from, the plan. This requirement would not prohibit an investment fund from imposing fees or charges normally assessed to any shareholder or investor in the normal course of business, such as redemption fees.

The bill also would eliminate the "one bad apple" rule under the tax Code referenced above, allowing plans with pooled plan providers (or MEPs with employers sharing a common interest) to continue to be treated as satisfying the tax qualification requirements despite the violation of those requirements with respect to one or more participating employers. In the case of a violation of the tax qualification requirements by a participating employer, the bill would allow the plan to spin off the portion of the plan's assets attributable to that participating employer, into a separate plan maintained by that employer. This removes another unnecessary legal impediment to greater use of MEP arrangements.

Allowing small employers to participate in a single, multiple-employer ERISA plan—regardless of the employer's industry or any other preexisting relationship with other participating employers or the plan sponsor—will reduce administrative and compliance costs and burdens, and ultimately improve the availability of retirement plans to employees of small employers. In addition, by providing a level of liability relief for investment options offered under the plan, small employers would be encouraged to participate in a MEP, while at the same time ensuring that plan participants are protected by ERISA.

B. The Time Has Come to Modernize and Make Consistent Rules for Electronic Delivery of Plan Information to Participants and Beneficiaries

1. Regulatory impediments are currently the most significant barrier to employers' use of electronic media

Under current IRS and DOL rules, there are four different regulatory standards governing the circumstances under which plans can deliver plan-related notices and disclosures electronically.

- Treasury Regulations permit electronic delivery of notices and disclosures if a participant has the "effective ability to access" electronic media.[21]

- Any disclosures required under ERISA can be made electronically (a) to a participant who has effective access to the document electronically at work and use of electronic information systems is an integral part of the participant's duties or (b) to a participant or beneficiary who offers affirmative consent.[22]

- 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.[23]

- Fee disclosures for participant-directed individual account plans 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.[24]

Not only are these four standards inconsistent with each other, but they unnecessarily limit the ability to make use of electronic delivery, effectively preventing plans and participants from gaining the efficiencies, cost savings, and enhanced disclosure that electronic delivery offers.

2. Improved electronic delivery rules would enhance disclosure for participants

The rules for using electronic delivery to provide information to retirement plan participants must be updated to reflect the dramatic and advantageous evolution in technology, and its expanding availability, over the past decade. Allowing plans to make electronic delivery the default method for communicating with participants (while still allowing participants to opt for paper) will:

- enhance the effectiveness of ERISA communications, particularly to individuals with disabilities or for whom English is not the primary language;
- produce significant cost savings for 80 million retirement investors;
- maintain security of information; and
- reduce the environmental impact of tons of discarded paper every single year.

More specifically, by facilitating electronic disclosure, regulatory notices can be streamlined 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

---

[21] See Treas. Reg. § 1.401(a)-21.

[22] See DOL Reg. § 2510.104b-1.

[23] See DOL Field Assistance Bulletin 2006-03.

[24] See DOL Technical Release 2011-03R.

participants will be more likely to read. The click-through/hyperlink nature of the internet allows participants to see exactly the level of information that is right for them.

The Securities and Exchange Commission's (SEC) enhancements to mutual fund prospectus requirements is instructive here. 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 which contains the key information that every investor should consider in connection with a potential investment in a mutual fund. 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. 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 summary plan description 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 DOL finalized in 2010, the regulation requires plans to furnish participants on enrollment and annually thereafter key information about plan investment options 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. For example, with electronic delivery, visually impaired individuals can use software to read notices to them or to increase the font size of communications. If a plan uses electronic delivery, individuals with disabilities could access plan communications either via electronic 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 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.

3. New research offers compelling and robust evidence in support of electronic disclosure

We have attached to this statement an important study on electronic delivery published in 2011 and updated in 2018, "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery." The study, led by Professor Peter Swire, concluded that shifting the default method of delivering DC plan participant disclosures to electronic delivery, rather than relying on outmoded paper delivery systems, would produce significant improvements in the efficiency and effectiveness of disclosure. In the attached update, Professor Swire and co-author DeBrae Kennedy-Mayo find that the evidence in support of a shift in the default method has grown even more compelling and urgent.[25] The update concludes that electronic delivery of notices, including DC plan notices, will reduce costs, provide greater access, and improve the quality of notices for Americans.

The study offers compelling and robust evidence to support a shift to electronic delivery, including:

- Internet usage has become virtually universal among plan participants. As of 2016, 93 percent of households owning DC accounts have access to the internet, up from 86 percent in 2010.

- Households with DC plan accounts use the internet at high rates, even if they are members of demographic groups that overall are less inclined to use the internet. For example, 79 percent of DC account–owning households with income between $20,000 and $39,999 make use of the internet, compared with just 67 percent of all US households with income in that range. Among households age 65 or older, 76 percent of DC account holders use the internet, compared with just 56 percent of all households in that age group.

- In 2016, 88 percent of households owning DC accounts engaged in online banking, just one example of the high and increasing comfort with using the internet for such sensitive activities as financial transactions and medical communications.

- Plan participants who interact with their plan's website tend to have higher contribution rates.

[25] Peter P. Swire is the Holder Chair of Law and Ethics at the Georgia Tech Scheller College of Business. He has appointments by courtesy with the College of Computing and School of Public Policy. He is Senior Fellow with the Future of Privacy Forum, a member of the National Academy of Sciences Forum on Cyber-Resiliency, and Senior Counsel with Alston & Bird, LLP. In 2015, the International Association of Privacy Professionals, which boasts over 20,000 members, awarded him its Privacy Leadership Award. His publications and other information are available at www.peterswire.net. DeBrae Kennedy-Mayo coauthored the 2018 update. Ms. Kennedy-Mayo is a Research Faculty Member at the Georgia Institute of Technology, where she engages in research on legal and policy issues concerning privacy and cybersecurity. She has been an attorney for 15 years.

- Since 2011, the quality of assistive technology on the internet has progressed greatly for the visually impaired and others with disabilities.

- The quality of translation software also has improved greatly since 2011: free translation software is now available to translate more than 100 languages, accounting for more than 99 percent of the online population.

- Electronic delivery is becoming the norm for the US government for delivery of notices. For example, the Social Security Administration, the Office of Personnel Management, and the federal Thrift Savings Plan often provide notices electronically.

- Plans would experience significant cost savings by changing the default delivery method to electronic delivery—savings that would be shared with plan participants. With an average of six mailings per year, assuming a cost of $0.80 per notice to one participant, total printing and mailing costs for paper delivery could exceed $385 million a year in aggregate.

The updated study provides overwhelming evidence that the time has come to provide retirement plan sponsors the flexibility to establish electronic delivery as the default method for communicating participant statements and other plan information.

4. H.R. 4610 recognizes the important benefits that electronic delivery offers

H.R. 4610 recognizes that electronic delivery is uniquely suited to facilitate understanding and response to information provided to participants. In fact, *how* information is delivered can enhance the effectiveness of the communications by highlighting key information, making additional information readily available, and enabling recipients easily to take action on the information. Electronic delivery can do this more effectively than paper delivery. At the same time, this legislation would preserve the ability of those participants who need or prefer paper to obtain it.

The bill provides that any document that is required by ERISA or the Code to be furnished to a participant, beneficiary or other individual (a "recipient") may be furnished electronically under a number of alternative methods:

- By direct delivery of the document to the recipient's email address.

- By posting on a continuously available website, if the recipient is notified that the document is available.

- Any other electronic means reasonably calculated to ensure actual receipt.

The bill also includes robust safeguards for participants who prefer to receive documents in paper form. Recipients must be sent an annual paper notice informing them of the right to request delivery of paper format, and a recipient who requests delivery of a paper document would be entitled to receive it at no additional cost. Any electronically furnished document must be presented in a manner that is consistent with the style, format, and content requirements applicable to the particular document (taking into account the electronic form of the document), and the system must incorporate measures reasonably designed to protect personal information.

H.R. 4610 will enhance the effectiveness of ERISA communications, maintain security of information, and reduce costs for plans that decide to use electronic delivery.

C. Additional Changes Will Foster Innovation and Growth in the Voluntary Employer-Sponsored Retirement Plan System

Even with its many current strengths, the US retirement system can be strengthened further to help even more Americans achieve a secure retirement. Attached to this statement is a document titled "Retirement Plan Modernization Proposals," describing policies supported by the Institute that would improve access to retirement savings opportunities and make retirement plans more efficient and effective. These reforms would build upon the current system by expanding coverage, participation, and savings rates in DC plans and IRAs; improving the delivery and quality of information and education to plan participants and plan sponsors; enhancing flexibility in determining how and when to tap retirement savings; and eliminating unnecessary burdens in plan administration so that plans can function more effectively.

In addition to expanding the use of MEPs and electronic delivery of plan information as discussed above, these proposed reforms include:

<u>New SIMPLE Plan</u>. As noted earlier, small businesses often face particular challenges in establishing and maintaining retirement plans. While the SIMPLE IRA and other existing plan options offer a relatively simple solution to plan sponsorship, none of the existing plan options work well for workplaces where the majority of workers are focused on saving for goals other than retirement—such as education, a home, or an emergency fund. Many small employers want to offer employees the option to contribute to a 401(k) or similar plan, but cannot meet the non-discrimination tests and do not have the capacity to make the required employer contributions associated with the safe harbor 401(k) plan or a SIMPLE plan. For employers whose workforces place less value on compensation paid as retirement benefits as opposed to take-home wages, the required employer contributions discourage the adoption of SIMPLE plans. Creating a new type of SIMPLE plan for small employers would encourage greater plan creation and coverage in smaller workplaces. The new plan would be modeled on existing SIMPLE plans, but would not require employer contributions. It would have contribution limits above traditional and Roth IRA limits, but below existing SIMPLE plan limits.[26] Such a plan would accommodate any employee who wants to save for retirement, while preserving the incentives for the employer to step up to a SIMPLE IRA or 401(k) plan.

<u>Enhance Automatic Enrollment Safe Harbors</u>. Studies show that automatic enrollment has a notable impact on the participation rates of lower-income and younger workers because these groups

---

[26] We note that a conceptually similar provision, referred to as the "starter k" plan, has been proposed by then Ranking Member Orrin Hatch (R-UT) in S. 1270, the "Secure Annuities for Employee (SAFE) Retirement Act of 2013."

are typically less likely to participate in a DC plan where affirmative elections are required.[27] Employers should be encouraged to use automatic enrollment if appropriate for their employee base. Employers may want to enroll their workers at higher levels of savings and escalate the savings more substantially than is perceived appropriate under current law. For plan sponsors that rely on the nondiscrimination testing safe harbor established under the Pension Protection Act of 2006—known as the qualified automatic contribution arrangement or "QACA"—the 10 percent ceiling is a barrier to escalating automatic contributions to levels that in some cases may be more appropriate for ensuring retirement adequacy. (In fact, even plan sponsors that do not rely on the QACA safe harbor often perceive the rule's 10 percent limit as a ceiling outside the safe harbor.) Accordingly, there is broad agreement across the retirement plan community for removing the 10-percent cap on automatic escalation deferral rates for plan participants.

In addition, while the QACA safe harbor has been applauded for encouraging the use of automatic enrollment, many plan sponsors believe that the safe harbor default contribution levels are too low and that higher contribution levels are necessary to ensure a secure retirement for plan participants. Creating a new automatic enrollment safe harbor would give employers another option alongside the QACA safe harbor, with higher minimum default contribution rates and a "stretched" matching contribution formula to encourage participants to contribute at least 10 percent of pay. A tax credit might also be included to encourage small employers to adopt the new automatic enrollment safe harbor. Another incentive to adopt the new safe harbor could be the option to apply a three-year cliff vesting period to employer matching contributions. ICI believes that these changes would give employers more flexibility to design their plans to meet the needs of their particular workforces and ultimately increase participation and savings rates.

<u>Index IRA Catch-up Contributions</u>. Another modest change to improve savings rates described in our proposals would be to index IRA catch-up contribution limits for inflation. Since their creation in 1974, IRAs have played a vital role in building retirement security for workers without access to a retirement plan at work, for small business owners, and for non-working spouses. Like contribution limits for workplace plans, the general contribution limit for IRAs is indexed so that its value is not eroded over time. The catch-up contribution limit for 401(k), 403(b) and 457(b) plans also are all inflation indexed, but the catch-up contribution limit for IRAs—which was last adjusted to $1,000 per year in 2006—is not. We believe the catch-up contribution limit for IRAs

[27] The EBRI/ICI 401(k) Accumulation Projection Model demonstrates the increases in retirement income that can result from automatic enrollment. Replacement rates, modeled after adding automatic enrollment and investing contributions in a target date fund, increase significantly. See Holden and VanDerhei, "The Influence of Automatic-Enrollment, Catch-Up, and IRA Contributions on 401(k) Accumulations at Retirement," *Investment Company Institute Perspective* 11, no. 2, and *EBRI Issue Brief*, no. 283 (July 2005); available at www.ici.org/pdf/per11-02.pdf and www.ebri.org/pdf/briefspdf/EBRI_IB_07-20054.pdf. Furthermore, studies find that adopting an automatic enrollment feature has a particularly strong impact on improving participation rates among low-income and younger workers. See, e.g., Utkus and Young, *How America Saves, 2017: Vanguard 2016 defined contribution plan data*, Vanguard Center for Retirement Research (2017); available at https://institutional.vanguard.com/iam/pdf/HAS17.pdf.

should be indexed for inflation for the same reason—so that workers' ability to save for their future is not eroded by increases in the cost of living.

Consolidate Notices. Over the years, the number of notices that must be provided to participants and beneficiaries has exploded. When ERISA was enacted in 1974, Congress intended that one document—the summary plan description—would be the notice that informed participants of their rights and obligations. Since then, a large number of additional notices have been imposed on retirement plans under ERISA and the Code—now numbering more than 30 that apply just to retirement plans. These include various safe harbor notices, the qualified default investment alternative (QDIA) notice, and fee disclosures for participant-directed plans. Many of these notices must be provided upon enrollment and annually thereafter, although the specific timing requirements vary according to applicable regulations. In implementing these rules, DOL and the Treasury have explicitly or implicitly discouraged combining these notices, even though together the notices provide interrelated information about a 401(k) plan's features. This discourages an integrated communication approach, complicates plan administration, and inundates participants with information. Particularly with technical materials, more is often less, and the proliferation of notices, sent at different times, may serve to confuse many participants and cause many notices to be overlooked. We propose permitting plans to use a single notice (which could be referred to as the "Quick Start" notice) that would combine the information currently required under various separate rules, including the QDIA notice, participant fee disclosures, 401(k) safe harbor notice, automatic contribution arrangement notices, and investment advice notices.[28] The proposal also would eliminate certain redundant or irrelevant notices, such as the summary annual report and deferred vested pension statement.

Target Date Fund Benchmarks. We also support a proposal to change current DOL rules for how performance information for target date funds must be compared to a benchmark, in order to simplify and make these benchmark comparisons more understandable to participants.

Permit Greater Flexibility for Savers. Two of our reform proposals would provide individuals with more flexibility to manage their retirement savings in a way that best meets their own individual needs. First, our proposal would amend the Code to increase the required beginning age for required minimum distributions (RMDs) from 70½ to at least 75, to reflect changing patterns of retirement savings and increases to life expectancy. Second, we support eliminating the maximum age for making traditional IRA contributions. Currently, individuals who reach age 70½ before the close of a taxable year may not make contributions to a traditional IRA for that year (or subsequent years). In view of the variability in how individuals save throughout their working lives, increases to life expectancy, and the corresponding potential for individuals to continue working past traditional retirement age, the law should not prevent workers aged 70½ and older from continuing to save for retirement.

Improve plan administration. Improvements can be made to the way plans are administered, and our proposals would ease the complicated administrative burdens that have accumulated over the

[28] See ICI Letter to ERISA Advisory Council, dated August 18, 2017, available at www.ici.org/pdf/30844a.pdf.

years as the legal landscape has changed. We believe that the following changes would improve plan administration and therefore reduce the compliance costs associated with plan sponsorship. For example, we support expanding the IRS compliance program to better address common errors that are relatively easy to fix, such as allowing plans to self-correct plan loan errors and missed RMD payments and expanding the compliance program to IRAs. In addition, our proposal would fix a problematic aspect of current 403(b) plan regulations that, in some situations, can prevent an employer from effectively terminating its 403(b) plan (even if, for example, the sponsoring employer goes out of business).

Preserve Social Security. The Institute also recognizes the significance of Social Security as the foundation of retirement security for almost all American workers. We urge Congress to preserve Social Security as a universal, employment-based, progressive basic pension for all Americans.

* * * * *

On behalf of the Institute and all of our members, I thank you for the opportunity to offer this statement. I look forward to answering any questions of the Subcommittee.

Attachments

2018 UPDATE TO

Delivering ERISA Disclosure for Defined Contribution Plans

WHY THE TIME HAS COME TO PREFER ELECTRONIC DELIVERY

Peter Swire & DeBrae Kennedy-Mayo

APRIL 2018

THE AUTHORS OF THIS 2018 UPDATE

PETER P. SWIRE is the Holder Chair of Law and Ethics at the Georgia Tech Scheller College of Business. He has appointments by courtesy with the College of Computing and School of Public Policy. He is Senior Fellow with the Future of Privacy Forum, a member of the National Academy of Sciences Forum on Cyber-Resiliency, and Senior Counsel with Alston & Bird, LLP. In 2015, the International Association of Privacy Professionals, among its over 20,000 members, awarded him its Privacy Leadership Award. His publications and other information are available at www.peterswire.net.

DEBRAE KENNEDY-MAYO is a Research Faculty Member at the Georgia Institute of Technology, where she engages in research on legal and policy issues concerning privacy and cybersecurity. Ms. Kennedy-Mayo has been an attorney for 15 years.

This 2018 update was prepared with support from the American Retirement Association and the Investment Company Institute. All the views expressed here are those of the authors.

CONTENTS

Supplementary Statistics for 2018 Update to Delivering ERISA Disclosure for Defined Contribution Plans

2018 UPDATE TO

Delivering ERISA Disclosure for Defined Contribution Plans

WHY THE TIME HAS COME TO PREFER ELECTRONIC DELIVERY

Peter Swire & DeBrae Kennedy-Mayo

Executive Summary

This document provides a 2018 update to the 2011 study on "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery." By 2011, there were compelling reasons to shift the default method to electronic delivery for holders of defined contribution (DC) plan accounts, rather than rely on outmoded paper delivery systems. **This 2018 update concludes that the reasons to shift to electronic delivery have become even stronger during the intervening seven years.**

This update makes three main points:

1. **Paper delivery costs significantly more than electronic delivery, and the government norm in other settings has become electronic delivery.**
   a. *The incremental cost of paper delivery is higher than electronic delivery.* A recent survey of DC plan recordkeepers finds that the average cost for printing and mailing a single notice of four pages to one person is roughly $0.80, which if mailed, just once, to all 80.3 million 401(k) plan participants would add up to more than $64 million. With an average of a minimum of six mailings per year, total printing and mailing costs could exceed $385 million.
   b. *The federal government recognizes the substantial cost savings from electronic delivery.* For instance, the Centers for Medicare and Medicaid Services (CMS) wrote in 2015 that the reason to shift to electronic delivery for Electronic Medicare Summary Notices (eMSNs) was that "CMS will realize significant costs savings for each beneficiary that decides to receive an eMSN instead of an MSN."
   c. *The norm for the U.S. government has become to rely on electronic rather than paper delivery for notices.* For example, agencies including the Social Security Administration, the Office of Personnel Management, and the federal Thrift Savings Plan often provide notices electronically.

2. **For tens of millions of people, access is better with electronic rather than paper delivery.**

   a. *Electronic delivery provides improved access for the visually impaired and others with disabilities.* Electronic delivery provides improved access for the over 20 million Americans who experience vision loss, as well as the many others who read better online, or have other disabilities. Since 2011, the quality of assistive technology has progressed greatly.

   b. *Improved translation software increases access.* About 25 million Americans speak best in a language other than English. Free translation software applies today for over 99 percent of the online population, and the quality of translation has improved greatly since 2011.

   c. *Benefits of electronic delivery include the potential to lead to increased saving and investing.* The interactivity of electronic delivery—whether just-in-time notices, layered notices, or online calculators—facilitates participant action and engagement. A recent survey of DC plan recordkeepers finds that 401(k) participants who interact with their plan's website tend to have higher contribution rates, and a similar result was found in the 2011 study as well.

3. **The internet has become a pervasive technology, similar to the telephone, so concern about lack of access to the internet is not a sound basis for preferring paper delivery.**

   a. *Working U.S. households' internet access is similar in pervasiveness to the telephone.* By 2017, 91.1 percent of working U.S. households had access to the internet, similar to the pervasiveness of the telephone. For households owning DC plan accounts, 93 percent used the internet in 2016.

   b. *DC plan account holders use the internet at high rates, even if they are members of demographic groups that overall have lower access to the internet ("lower-access groups").*

      - 82 percent of households owning DC accounts with household income under $20,000 use the internet, compared with 57 percent of all U.S. households with household income under $20,000.
      - 79 percent of households owning DC accounts with household income between $20,000 and $39,999 use the internet, compared with 67 percent of all U.S. households with household income between $20,000 and $39,999.
      - 76 percent of households without a high school diploma who are DC plan account holders use the internet, compared with 48 percent of all U.S. households without a high school diploma.
      - 76 percent of households age 65 or older who are DC plan account holders use the internet, compared with 56 percent of all U.S. households who are 65 or older.

   c. *Households owning DC accounts also overwhelmingly use the internet for sensitive financial transactions.* In 2016, 88 percent of households owning DC accounts engaged in online banking, just one example of the high and increasing comfort with using the internet for financial, medical, and other sensitive activities.

The 2011 study made numerous other points that showed advantages of electronic over paper delivery. Significant advantages included (and continue to include):

1. Electronic notices enable **access anytime, anywhere**, with the device of the user's choosing, and with a better filing system than paper notices.
2. The **quality of notice** is better online, with interactivity and just-in-time notices.
3. Electronic delivery provides a range of **improved functions** compared with paper notice, such as online calculators and integration with a user's other financial accounts. It also advances program goals, such as increased savings by participants.
4. There are important **cybersecurity advantages** compared to risks from paper notices.

In conclusion, the more recent data included in this 2018 update reaffirm that the 2011 findings hold true today about advantages of electronic over paper delivery for notices about DC plans. **Electronic delivery of notices, including DC plan notices, will reduce costs, provide greater access, and improve the quality of notices for Americans.**

The 2011 Study

The 2011 study examined the issue of whether to change the U.S. Department of Labor (DOL) regulations governing the choice between paper and electronic delivery of required information and notices to participants under the Employee Retirement Income Security Act of 1974 (ERISA), including in connection with DC plans, such as 401(k) plans.

See Peter Swire and Kenesa Ahmad, "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery," *available at* https://ssrn.com/abstract=1960669.

2018 UPDATE TO

Delivering ERISA Disclosure for Defined Contribution Plans

WHY THE TIME HAS COME TO PREFER ELECTRONIC DELIVERY

Peter Swire & DeBrae Kennedy-Mayo

This document provides a 2018 update to the 2011 study on "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery."[1] By 2011, there were compelling reasons to shift the default method to electronic delivery for holders of defined contribution (DC) plan accounts, rather than rely on outmoded paper delivery systems. **This 2018 update concludes that the reasons to shift to electronic delivery have become even stronger during the intervening seven years.**

Part 1 of this update discusses how paper delivery costs significantly more than electronic delivery, and the government norm in other settings has become electronic delivery. Part 2 discusses how, for tens of millions of people, access is better with electronic rather than paper delivery. Part 3 explains that the internet has become a pervasive technology, similar to the telephone, so concern over lack of access to the internet is not a sound basis for preferring paper delivery.

[1] The 2011 study examined the issue of whether to change the U.S. Department of Labor (DOL) regulations governing the choice between paper and electronic delivery of required information and notices to participants under the Employee Retirement Income Security Act of 1974 (ERISA), including in connection with DC plans, such as 401(k) plans. *See* Peter Swire and Kenesa Ahmad, "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery," *available at* https://ssrn.com/abstract=1960669.

PART 1:

Paper delivery costs significantly more than electronic delivery, and the government norm in other settings has become electronic delivery.

a. The incremental cost of paper delivery is higher than electronic delivery. Paper delivery requires, for each person, expenditures including paper, printing, envelopes, and postage, in contrast to a near-zero marginal cost of electronic delivery. A recent survey of DC plan recordkeepers finds the average cost for printing and mailing a single notice of four pages to one person is roughly $0.80,[2] which if mailed, just once, to all 80.3 million 401(k) plan participants[3] would add up to more than $64 million. With an average of a minimum of six mailings per year, total printing and mailing costs could exceed $385 million.[4] By contrast, the cost of electronic notice to one additional person is much lower. Once the notice is drafted, the incremental cost of email to one person is essentially zero. As discussed in the 2011 study, there are also environmental benefits to electronic delivery such as avoiding the destruction of trees and reducing burden on landfills.

b. The federal government recognizes the substantial cost savings from electronic delivery. In 2015, for instance, the Centers for Medicare and Medicaid Services (CMS) required notices to be sent to all Medicare recipients about its Electronic Medicare Summary Notices (eMSNs). CMS indicated it wished "to promote this new eMSN program to beneficiaries." The reason given for the shift was cost: "*CMS will realize significant costs savings for each beneficiary that decides to receive an eMSN instead of an MSN.*"[5] This Medicare change is an example of where the government has shifted to electronic

---

[2] The Investment Company Institute conducted the survey in the winter of 2017/2018 to gather information on printing and mailing costs from a cross-section of DC plan recordkeepers. Survey respondents provided recordkeeping services for more than 40 million 401(k) plan participant accounts in 2017. Responses were weighted by the number of participant accounts.

[3] Based on Department of Labor summary statistics on 401(k) plans for plan year 2015, the total number of participants—including active participants and those who have separated from employment but still have accounts in the plan—was 80.3 million in plan year 2015. *See* U.S. Department of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2015 Form 5500 Annual Reports* (February 2018; Version 1.0) *available at* https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2015.pdf.

[4] This assumes four quarterly statements and two regulatory notices, but it is common for plans to send four quarterly statements and four regulatory notices, which would increase printing and mailing costs to more than $500 million in a year. This estimate falls within the range previously estimated for the SPARK Institute. A report prepared for the SPARK Institute in 2015 found annual savings for shifting to electronic delivery for retirement plan notices of $300 million to $750 million per year. *See* "Improving Outcomes with Electronic Delivery of Retirement Plan Documents," *available at* www.sparkinstitute.org/content-files/improving_outcomes_with_electronic_delivery_of_retirement_plan_documents.pdf.

[5] *See* "Implementing the Insertion of a Sheet of Paper Promoting the Electronic Medicare Summary Notices (eMSNs) into Mailed Medicare Summary Notices (MSNs)," *available at* https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/downloads/R1539OTN.pdf.

delivery when the government incurs the cost. The same efficiency logic applies to shift to electronic delivery when the cost falls on private-sector actors such as DC plans.

c. The norm for the U.S. government has become to rely on electronic rather than paper delivery for notices. For example, agencies including the Social Security Administration, the Office of Personnel Management, and the federal Thrift Savings Plan (TSP) often provide notices electronically. The Social Security Administration delivers its beneficiary statements electronically.[6] The federal TSP uses paperless delivery by default for its quarterly statements, unless an individual requests mail delivery.[7] The Office of Personnel Management provides health benefits brochures electronically, except where an individual specifically requests paper delivery.[8]

Because electronic delivery costs so much less than paper notice, the onus should be on those supporting paper notice. As discussed throughout the 2011 study and this update, electronic delivery has many advantages (besides cost savings) compared with paper delivery, including better quality and better access to notice for millions of people. So long as there is a choice to receive mail (paper) delivery for those who prefer it, there is a compelling case going forward for using electronic delivery by default.

---

[6] *See* Stephen Ohlemacher, "Social Security Stopping Mailed Earning Statements," (April 7, 2011), *available at* www.registercitizen.com/news/article/Social-Security-stopping-mailed-earning-statements-12080271.php; Social Security Administration, "How can I get a Social Security Statement that shows a record of my earnings and an estimate of my future benefits?" *available at* https://faq.ssa.gov/ics/support/KBAnswer.asp?questionID=3709 (default delivery of statements through the individual's online Social Security account); and Doug Walker, "Your Social Security Statement is now at your fingertips," *Social Security Matters* (July 7, 2016), *available at* https://blog.ssa.gov/your-social-security-statement-is-now-at-your-fingertips/.

[7] The default delivery mechanism for quarterly TSP participant statements is electronic: "The TSP issues quarterly statements in January, April, July, and October. Your first quarterly statement is mailed to you. An annual statement is issued in February. Your quarterly statements cover all transactions in your account during the previous 3 months. If you have any TSP loans, the statement also summarizes your loan activity. You can view or print these statements from the My Account section of this website or request to have them mailed to you." Annual statements are available on the website and by mail unless the individual requests electronic annual statements only. *See Managing Your Account: Your Participant Statements, Thrift Savings Plan* (2017), *available at* https://www.tsp.gov/PlanParticipation/AccountManagement/managing/participantStatements.html; Participant Statements, Summary of the Thrift Savings Plan, (May 2012), Thrift Savings Plan, p. 25, *available at* www.justice.gov/sites/default/files/tax/legacy/2013/04/18/tspbk08.pdf; and Federal Retirement Thrift Investment Board, Memorandum for the Executive Director, Annual Participant Statement (February 6, 2007), *available at* www.frtib.gov/pdf/minutes/MM-2007Feb-Att6.pdf. *See also* U.S. Government Accountability Office, "Federal Thrift Savings Plan: Customer Service Practices Adopted by Private Sector Plan Managers Should Be Considered," GAO-05-38 (January 2005) at 12, n. 21, *available at* www.gao.gov/new.items/d0538.pdf (providing statistics on cost savings experience with TSP).

[8] *See* Benefit Administrator Letter, Number 16-401, Office of Personnel Management (August 18, 2016), *available at* https://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2016/16-401.pdf; and Joe Davidson, "OPM asks health insurers to provide incentives for wellness programs," *Washington Post* (March 24, 2011), *available at* https://www.washingtonpost.com/local/politics/opm-asks-health-insurers-to-provide-incentives-for-wellness-programs/2011/03/24/ABV58QRB_story.html?utm_term=.3f3f31de2865.

PART 2:

For Tens of Millions of People, Access Is Better with Electronic Rather Than Paper Delivery.

In connection with the 2011 discussions of whether to shift to electronic delivery, the principle argument made in favor of paper delivery was better access for some users, especially those who lack access to the internet. For tens of millions of Americans, however, access is better for electronic delivery than for paper delivery. Since the 2011 study, technology has notably improved access in two domains. First, electronic delivery has continued to improve access for the visually impaired and others with disabilities. Second, dramatic advances in translation software have improved access for those who prefer to use a language other than English. Third, electronic delivery can engage participants with their 401(k) plans and lead to increased saving and investing.

a. Electronic delivery provides improved access for the visually impaired and others with disabilities.

Electronic disclosure enables better access than paper notice for the large population of participants with disabilities, and the quality of online access has improved greatly since 2011. According to the report for the 2015 National Health Interview Survey, 23.7 million American adults age 18 and older reported experiencing vision loss.[9] The term "vision loss" refers to individuals who experience difficulty seeing, even when wearing glasses or contact lenses and individuals who are blind or unable to see at all.

Electronic notices allow all users to set font size to their preference, and new research shows, for readers generally, that "readability, measured via mean fixation duration, increased significantly with font size."[10] For elderly and those with modest vision impairment, the ability to read online, with larger text and brighter light, is often crucial to effective reading. For those with color blindness, participants can use high contrast fonts or colors. The advantages of electronic disclosure are not limited only to individuals with visual impairments. For example, individuals who do not have use of their hands may use speech recognition software to navigate a website.

As with computing technology generally, there has been great progress since 2011 in the quality of assistive technology. In 2011, the chairman of the Royal National Institute for Blind People promised to make a refreshable braille display at a fraction of the then-exorbitant cost and with a higher refresh rate. By 2016, that promise was fulfilled.[11] In 2017, Apple published a list of 117 iOS apps developed to

---

9 *See* American Foundation for the Blind, Facts and Figures on Adults with Vision Loss (January 2017), *available at* www.afb.org/info/blindness-statistics/adults/facts-and-figures/235.

10 *See* Luz Rello, Martin Pielot, and Mari Carmen Marcos, "Make it Big! The Effect of Font Size and Line Spacing on Online Readability," Pielot (2016), *available at* https://pielot.org/pubs/Rello2016-Fontsize.pdf.

11 *See* Alix Hackett, "A low-cost revolution in refreshable braille," Perkins School for the Blind (March 24, 2016), *available at* www.perkins.org/stories/a-low-cost-revolution-in-refreshable-braille.

help the visually-impaired perform everyday tasks (e.g., navigation, cooking, reading). Virtually all were developed after 2011.[12] Recent mobile apps for the visually-impaired have substantially improved in cost and effectiveness, "even in cases where computational requirements are significant."[13]

b. Improved translation software increases access. Translation software has progressed considerably since 2011. This software, available for free online, dramatically improves the availability and quality of notice to the millions of Americans for whom English is not the first language. The number of such Americans is high today. As of 2016, about 42 million, or 14.0 percent of the total U.S. population, were foreign-born, and nearly 21 million of them reported that they spoke English less than "very well."[14] Foreign-born residents comprised most of the increase in the prime 25-54 working age population in the past decade,[15] with those persons being in prime years for opening DC plan accounts. In addition, nearly 5 million persons born in the United States are most comfortable with a language other in English.[16]

For these 25 million Americans, the coverage and quality of translation software has improved greatly since 2011. The number of languages translated by the free Google service, as one example, roughly doubled from 2011 to 2016.[17] That service translates over 100 languages today, for languages accounting for over 99 percent of the online population.[18] In terms of *quality* of translation, the progress has similarly been rapid since 2011. In 2016, Google announced its new Neural Machine Translation system, which reduces errors by an estimate of 60 percent.[19]

In short, the continued progress in translation software means that electronic delivery provides free access, in the preferred language, to tens of millions of Americans. By contrast, paper delivery does not provide simple access to translation software.

---

12 *See* "iOS Apps Developed Specifically for Blind or Low-Vision Users," AppleVis (no date), *available at* https://www.applevis.com/apps/ios-apps-for-blind-and-vision-impaired.

13 *See* Adam Csapo, Gyrogy Wersenyi, Hunor Nagy, and Tony Stockman, "A survey of assistive technologies and applications for blind users on mobile platforms: a review and foundation for research," *Journal of Multimodal User Interfaces 9* (2015): 275-286.

14 *See* U.S. Census Bureau, "2012-2016 American Community Survey Five-Year Estimates," *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_B16005&prodType=table.

15 *See* William A. Kandel and Ruth Ellen Wasem, "U.S. Immigration Policy: Chart Book of Key Trends," p. 4, Congressional Research Service (March 14, 2016), *available at* https://fas.org/sgp/crs/homesec/R42988.pdf.

16 According to the U.S. Census Bureau, about 4.7 million native-born Americans reported speaking English less than "very well." *See* U.S. Census Bureau, "2012-2016 American Community Survey Five-Year Estimates," *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_B16005&prodType=table.

17 *See* Kingsley, Jeremy. "Google Translate: It already speaks 57 languages as well as a 10-year old. How good can it get?" *Slate* (October 31, 2011), *available at* www.slate.com/articles/technology/technology/2011/10/google_translate_will_google_s_computers_understand_languages_be.html. By February 2016, the Google service translated 103 languages. *See* Alanna Petroff, "Google Translate now covers 103 languages," *CNN Tech* (February 18, 2016), *available at* http://money.cnn.com/2016/02/18/technology/google-translate-languages/index.html. Translation software is now available from many companies and as part of many online services.

18 *See* Alanna Petroff, "Google Translate now covers 103 languages," *CNN Tech* (February 18, 2016), *available at* http://money.cnn.com/2016/02/18/technology/google-translate-languages/index.html.

19 *All Things Considered*, "Google Announces Improvements to Translation System" (October 3, 2016), *available at* https://www.npr.org/2016/10/03/496442106/google-announces-improvements-to-translation-system.

c. Benefits of electronic delivery include the potential to lead to increased saving and investing. The interactivity of electronic delivery helps achieve public policy goals for DC plans of increasing retirement savings and enabling participants to manage their accounts. Common examples of benefits are just-in-time notices, layered notices, and online calculators. In addition, DC plan recordkeepers indicate that participants who engage with their plan's website tend to have higher contribution rates.

In the retirement plan context, electronic delivery works better than paper for just-in-time notice, notably for increasing a participant's contributions, changing the mix of investments, or making other modifications to the participant's account.[20] With a paper notice, an individual must read the notice and then shift to another channel, such as filling in a form and handing it to HR, making a telephone call or visiting a website, to make any change. By contrast, electronic notice allows the participant to click immediately for more information or to take an action. For instance, participants who are falling behind in their investment goals can increase their savings rate as soon as they see their quarterly benefit statement report. If a blackout period is coming, the participant can make any desired changes before the blackout period starts.

Layered notices work better for electronic than for paper disclosures. In a paper system, there can be a top page that gives the summary. Then a consumer who wishes to dig deeper has to flip through the attached booklet or stack of other forms to find the relevant other pieces. By contrast, electronic disclosures may use hyperlinks—the user simply clicks on a link when interested in learning more or taking an action, and then can click back to the summary when that is complete. Layered notices thus work better electronically on the two key dimensions of better comprehension for the user and greater ability for the user to take action.[21]

As early as 2010, findings suggested that participants' being online where they could use online calculators had the potential to increase investment by these individuals.[22] According to Edmund Murphy of Putnam Investments, Putnam's analysis of aggregate behavior of participants who used the tool on their own on the Putnam website in July and August 2010 shows that about one-third

[20] A "just-in-time" approach uses notices to provide information at the moment in time when it is actionable, for example, when a participant is called upon to make a decision about benefits.

[21] The "layered" notice is the logical response to the competing demands for detail and clarity. The top layer of notice is brief and often presented in a visually accessible form such as the table used in the model financial privacy disclosure. Further levels of detail are available for employees, regulators, and the subset of consumers who wish to dig deeper into the longer disclosures.

[22] Online sites for many plans have "calculators"—tools that let the participant see the different outcomes of different savings scenarios.

changed their deferral rate after using it. Of those, 80 percent elected to increase their salary deferral by an average of more than two full percentage points, from 6.1 percent before the site visit to 8.6 percent after.[23] According to a 2011 survey by the Principal Financial Group, Principal plan participants who used the online tool saved an average of 39 percent more than participants that did not use the tool: "[t]he average deferral rate for a sample group of Milestones users is 2.5 percentage points higher (8.9 percent) than those who have not completed Milestones (6.4 percent)."[24] Similarly, a recent survey of DC plan recordkeepers finds that 401(k) participants who interact with their plan's website tend to have higher contribution rates.[25]

---

[23] Putnam's Lifetime Income Analysis ToolSM highlights a participant's potential monthly retirement income needs compared with monthly income if he or she keeps saving at current levels. *See* Edmund Murphy, Putnam Investments, Testimony on Lifetime Income Issues, Joint Hearing before the U.S. Department of Labor, Employee Benefits Security Administration (EBSA) and the U.S. Treasury Department, Internal Revenue Service (IRS) (September 14, 2010), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB33/writtentestimony26.pdf.

[24] The Principal Financial Group provides plan participants with My Principal Edge Milestones, an online interactive tool that uses certain participant information to identify areas of underperformance and provides a personalized guide to help participants meet their retirement goals. *See* "The Principal: 401(k) Participants Using Online Tool Defer 39% More," *Business Wire* (February 28, 2011), *available at* https://www.businesswire.com/news/home/20110228006869/en/Principal-401-Participants-Online-Tool-Defer-39.

[25] The Investment Company Institute conducted the survey in the winter of 2017/2018 to gather information on printing and mailing costs from a cross-section of DC plan recordkeepers. A subset of respondents also were able to provide participant deferral rates among 401(k) plan participants who had interacted with the plan website compared with those participants who had not interacted with the plan website. Responses were weighted by number of participant accounts. The average participant contribution rate among participants not interacting with the plan website was 5.8 percent of salary, compared with an average 7.8 percent contribution rate among participants who had interacted with their plan website.

PART 3:

The Internet Has Become a Pervasive Technology, Similar to the Telephone, So Concern About Lack of Access to the Internet Is Not a Sound Basis for Preferring Paper Delivery.

Concern about lack of internet access has likely been the biggest objection raised to wider use of electronic notices. Today, the evidence is overwhelming that a large majority of all households has access to the internet, and the access of households with DC accounts is even higher.

a. Working U.S. households' internet access is similar in pervasiveness to the telephone. The 2011 study documented the diffusion of the internet into society, similar to previous technologies such as radio, television, and the telephone. From 1980 to 2009, the percent of households that had a telephone varied between 92.9 and 95.7 percent.[26] More recently, from January to June 2017, 96.3 percent of U.S. households have access to some type of phone (only 3.7 percent had no telephone service).[27] A survey in mid-2017 found that 91.1 percent of working U.S. households already had access to the internet, showing a similarly pervasive diffusion of internet access.[28] By 2016, the diffusion of the internet has become even more complete, notably for households owning DC plan accounts. In 2013, 89 percent of households owning DC accounts used the internet, rising to 93 percent in 2016.[29]

b. DC plan account holders use the internet at high rates, even if they are members of demographic groups that overall have lower access to the internet ("lower-access groups"). Fifty-seven percent of U.S. households with household income under $20,000 use the internet while 82 percent of households owning DC accounts with household income under $20,000 use the internet. Sixty-seven percent of U.S. households with household income between $20,000 and $39,999 use the internet compared with 79 percent of households owning DC accounts with household income between $20,000 to $39,999. Forty-eight percent of U.S. households without a high school diploma use

---

[26] *See* Alexander Belinfante, "Telephone Subscribership in the United States (Data through July 2009)," Federal Communications Commission (December 2009), at 2, *available at* https://prodnet.www.neca.org/publicationsdocs/wwpdf/fccsubreport.pdf.

[27] *See* Stephen J. Blumberg and Julian V. Luke, "Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January–June 2017," National Health Interview Survey Early Release Program (2017), *available at* www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201712.pdf.

[28] This result is from the Investment Company Institute Annual Mutual Fund Shareholder Tracking Survey. For a description of the survey, *see* Sarah Holden, Daniel Schrass, and Michael Bogdan, "Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet, 2017," *ICI Research Perspective* (October 2017), *available at* https://www.ici.org/pdf/per23-07.pdf.

[29] Investment Company Institute tabulations of the Federal Reserve Board Survey of Consumer Finances (2013 and 2016). In 2013, 72 percent of all U.S. households used the internet, rising to 79 percent in 2016.

the internet, while 76 percent of households without a high school diploma who are DC account holders use the internet. Fifty-six percent of U.S. households who are 65 or older use the internet, compared with 76 percent of households age 65 or older who are DC account holders.[30]

c. Households owning DC accounts also overwhelmingly use the internet for sensitive financial transactions. In 2016, 88 percent of households owning DC accounts engaged in online banking, up from 83 percent in 2013.[31] This pervasive and voluntary use of online banking, among the relevant population of DC plan holders, is significant. It shows the reliance of users on the internet for transaction accounts where there is a risk that a fraudster may actually withdraw money. By contrast, the discussion about electronic notice involves less risky activities. Electronic notice provides information about an individual's account, but does not provide the ability to actually take money from that account.

The widespread use of online banking among DC account holders, is just one example of Americans' high and increasing comfort with using the internet for financial, medical, and other sensitive activities. Since 2011, Americans, generally, have increased comfort with these kinds of activities on the internet, researching financial and health[32] issues, and increasingly engaging in online banking activities. For instance, about half of adults engaged in mobile banking deposited checks through their mobile phones.[33]

The shift to electronic delivery is overdue for notices to DC account holders, given their widespread access to the internet and demonstrated comfort with conducting financial transactions online.

[30] Investment Company Institute tabulations of the 2016 Federal Reserve Board Survey of Consumer Finances. Lower-access groups make up a small percentage of the DC plan account holders. Only 2 percent of households with DC plan accounts have household income under $20,000, and 11 percent have household income between $20,000 to $39,999. Only 5 percent of DC plan account–owning households lack a high school diploma. Only 10 percent of DC plan account–owning households are 65 or older.

[31] Investment Company Institute tabulations of the Federal Reserve Board Survey of Consumer Finances (2013 and 2016). Sixty-four percent of the all U.S. households engaged in online banking in 2013, while 71 percent did so in 2016.

[32] A Pew Research Center survey conducted in 2013 found that 59 percent of adults searched online for health information. *See* "Majority of Adults Look Online for Health Information," *available at* www.pewresearch.org/fact-tank/2013/02/01/majority-of-adults-look-online-for-health-information/.

[33] In 2015, 87 percent of the U.S. adult population used mobile phones, and 43 percent of all mobile phone users with a bank account had used mobile banking in the 12 months prior to the survey. Among the mobile phone users that used mobile banking, 48 percent deposited a check to an account electronically using a mobile phone camera (known as remote deposit capture). *See* U.S. Federal Reserve Board, "Consumers and Mobile Financial Services 2016" (March 2016), *available at* https://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201603.pdf. A Bank of America survey in 2016 similarly found that, 47 percent of mobile banking users deposited checks using their phones. *See* Bank of America, "Trends in Consumer Mobility Report, 2016," *available at* http://newsroom.bankofamerica.com/files/press_kit/additional/2016_BAC_Trends_in_Consumer_Mobility_Report.pdf.

CONCLUSION

The 2011 study made numerous other points that showed advantages of electronic over paper delivery. Significant advantages included (and continue to include):

1. Electronic notices enable **access anytime, anywhere**, with the device of the user's choosing, and with a better filing system than paper notices.
2. The **quality of notice** is better online, with interactivity and just-in-time notices.
3. Electronic delivery provides a range of **improved functions** compared with paper notice, such as online calculators and integration with a user's other financial accounts. It also advances program goals, such as increased savings by participants.
4. There are important **cybersecurity advantages** compared with risks from paper notices.

In short, the 2011 findings hold true today about advantages of electronic over paper delivery for notices about DC plans. **Electronic delivery of notices, including DC plan notices, will reduce costs, provide greater access, and improve the quality of notices for Americans.**

SUPPLEMENTARY STATISTICS FOR

2018 UPDATE TO

Delivering ERISA Disclosure for Defined Contribution Plans

WHY THE TIME HAS COME TO PREFER ELECTRONIC DELIVERY

Peter Swire & DeBrae Kennedy-Mayo

This supplement provides supporting statistics for the "2018 Update to Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery." There are two parts to these supplementary statistics: (1) Supplementary Statistics Concerning Internet Usage as It Relates to Defined Contribution (DC) Plan Account Holders; and (2) Supplementary Information on Defined Contribution (DC) Plan Disclosures, Average Costs of Paper Delivery, and Average Contribution Rates for Participants Who Interact with the Plan Website.

1. Supplementary Statistics Concerning Internet Usage as It Relates to Defined Contribution (DC) Plan Account Holders

This supplement provides information relevant to DC plan account holders, contrasted with U.S. households more generally, across a variety of demographic characteristics. The supplement may be useful for providing context to discussion of the 2017 Data and Society report by Mary Madden on "Privacy, Security, and Digital Inequality."[34] The Madden report's statistics highlight that some demographic groups have lower rates of internet usage, a result that also is found in analysis of the Federal Reserve Board's Survey of Consumer Finances.

The main point of these statistics concerning internet usage is that it is the universe of DC plan account holders, rather than all U.S. households, that is relevant to the Department of Labor decision about electronic and paper notice. Although broadly some demographic groups use the internet at lower rates, the relevant population of DC plan account holders have essentially pervasive internet usage across all age, education, and income groups with DC accounts.

This supplement analyzes the Survey of Consumer Finances data on U.S. households and households with DC plan accounts across different age, education level, and income groups. The key takeaways are:

a. Internet usage, which is high across all U.S. households, is even higher among households with DC plan accounts.

b. While internet usage varies across all U.S. households, the gap between "lower-access" groups and "higher-access" groups has narrowed over time.

c. A vast majority of households owning DC plan accounts use the internet, regardless of age, education, or income.

d. Households with DC accounts hail from all age, education, and income groups, but they are less likely to be very old, very low education, or very low income compared with all U.S. households.

e. Internet usage for households owning DC accounts who fall within "lower-access" populations is still widespread.

f. Even within "lower-access" groups, internet usage is significantly higher among households owning DC accounts than among the general population.

g. Comparison of 2010 and 2016 statistics for "lower-access" populations highlights significant increases since the time of the prior study.

[34] *See* Mary Madden, "Privacy, Security, and Digital Inequality," Data and Society (September 2017), p. 38, *available at* https://datasociety.net/pubs/prv/DataAndSociety_PrivacySecurityandDigitalInequality.pdf.

a. Internet usage, which is high across all U.S. households, is even higher among households with DC plan accounts. In 2016, 79 percent of U.S. households and 93 percent of households owning DC accounts used the internet (Table 1).[35,36]

Use of the internet has risen over time, up from 67 percent in 2010 for all U.S. households, and up from 86 percent in 2010 among households owning DC accounts.

TABLE 1

DC-Owning Households Have High Rates of Internet Access

Percentage of households owning DC accounts or all U.S. households

USE THE INTERNET	2010	2013	2016
Households owning DC plan accounts	86%	89%	93%
All U.S. households	67%	72%	79%

Source: Investment Company Institute tabulations of the Federal Reserve Board Survey of Consumer Finances (2010, 2013, and 2016)

[35] The Federal Reserve Board's triennial Survey of Consumer Finances (SCF) collects information about family incomes, net worth, balance sheet components, pensions, credit use and demographic characteristics. The majority of the data are collected between May and December of each survey year. In 2016, 6,254 families were interviewed for the survey. These families represented almost 126 million U.S. households in 2016. In 2016, nearly 36 percent of households in the SCF owned a DC retirement plan. In the SCF, DC plans can be owned by either the head of household or spouse, and can be 401(k) plans, 403(b) plans, profit sharing plans, supplemental retirement annuities, or the federal government's Thrift Savings Plan (TSP). These plans can either be at current places of employment or accumulations held at previous jobs. Research reports, chart books, and underlying data for the SCF can be found at https://www.federalreserve.gov/econres/scfindex.htm.

[36] In addition, Investment Company Institute survey data find that 80 percent of U.S. households and 93 percent of households owning DC accounts had internet access in 2017. For a description of the survey, *see* Sarah Holden, Daniel Schrass, and Michael Bogdan, "Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet, 2017," *ICI Research Perspective* (October 2017), *available at* www.ici.org/pdf/per23-07.pdf.

b. While internet usage varies across all U.S. households, the gap between "lower-access" groups and "higher-access" groups has narrowed over time. Older, lower-education, and lower-income households tend to have lower internet usage rates, but their interaction with the internet has greatly increased over time, which has narrowed the access gap (Table 2). For example, in 2016, 56 percent of U.S. households age 65 or older used the internet, compared with 39 percent in 2010. Similarly, in 2016, 57 percent of U.S. households with income less than $20,000 used the internet, compared with 43 percent in 2010.

TABLE 2

Internet Use Has Increased Across All Groups of U.S. Households

Percentage of U.S. households

USE THE INTERNET	2010	2013	2016
Age of head of household			
Younger than 35	80%	86%	92%
35 to 44	77%	83%	92%
45 to 54	75%	79%	86%
55 to 64	69%	72%	79%
65 or older	39%	47%	56%
Education level of head of household			
No high school diploma	28%	38%	48%
High school diploma/GED	56%	60%	71%
Some college or associates degree	77%	81%	84%
College or postgraduate degree	87%	90%	93%
Household income			
Less than $20,000	43%	45%	57%
$20,000 to $39,999	53%	61%	67%
$40,000 to $59,999	71%	77%	81%
$60,000 to $79,999	80%	83%	88%
$80,000 to $99,999	88%	88%	92%
$100,000 or more	92%	94%	95%
All U.S. households	67%	72%	79%

Source: Investment Company Institute tabulations of the Federal Reserve Board Survey of Consumer Finances (2010, 2013, and 2016)

Similar to the Survey of Consumer Finances, the Madden report also finds variation in internet use by income and education level among the general population of U.S. adults. According to that report, overall, 82 percent of U.S. adults used the internet (or email) in 2015, ranging from 64 percent of adults with household income less than $20,000 to 96 percent of adults with household income of $100,000 or more; and from 45 percent of adults with no high school degree to 96 percent of college graduates.[37]

[37] *See* "Internet use and smartphone ownership by income and generation," in Madden, p. 39.

c. A vast majority of households owning DC plan accounts use the internet, regardless of age, education, or income. In 2016, 93 percent of households with DC plan accounts used the internet (Table 3), and their use of the internet was higher across all age, education, or income groups compared with the comparable groups across all U.S. households (Table 2).[38] Internet usage rates range from more than three-quarters (76 percent) of DC-owning households age 65 or older to nearly all younger DC-owning households; from more than three-quarters (76 percent) of DC-owning households with less than a high school education to nearly all with college degrees or more education; and from about eight-in-ten DC-owning households earning less than $40,000 in household income to nearly all DC-owning households earning $60,000 or more (Table 3).

TABLE 3

Internet Use Is High Across All Groups of DC Account–Owning Households

Percentage of households with DC plan accounts

USE THE INTERNET	2010	2013	2016
Age of head of household			
Younger than 35	92%	94%	97%
35 to 44	90%	93%	99%
45 to 54	85%	90%	95%
55 to 64	82%	85%	88%
65 or older	63%	72%	76%
Education level of head of household			
No high school diploma	57%	61%	76%
High school diploma/GED	75%	79%	86%
Some college or associates degree	88%	90%	93%
College or postgraduate degree	94%	96%	98%
Household income			
Less than $20,000	56%	82%	82%
$20,000 to $39,999	70%	70%	79%
$40,000 to $59,999	81%	83%	88%
$60,000 to $79,999	86%	88%	94%
$80,000 to $99,999	91%	92%	95%
$100,000 or more	95%	98%	97%
All U.S. households with DC plan accounts	86%	89%	93%

Source: Investment Company Institute tabulations of the Federal Reserve Board Survey of Consumer Finances (2010, 2013, and 2016)

[38] The differences in usage of the internet among DC-owning households compared with all U.S. households were greatest in the oldest household group—76 percent of DC-owning households age 65 or older used the internet in 2016, compared with 56 percent of all U.S. households age 65 or older; in the lowest education level household group—in 2016, 76 percent of DC-owning households with less than a high school education used the internet, compared with 48 percent of all U.S. households with less than high school education; and the lowest income group—82 percent of DC-owning households with less than $20,000 in household income used the internet, compared with 57 percent of such lower income households over all. *See* Tables 2 and 3.

d. Households with DC accounts hail from all age, education, and income groups, but they are less likely to be very old, very low education, or very low income compared with all U.S. households. Households owning DC plan accounts, on average, have higher income and education than the full population. Eighty-seven percent of households owning DC plan accounts have income of at least $40,000 a year, compared with 62 percent of all U.S. households (Table 4). As to education, 95 percent of households with DC accounts have at least a high school education and 74 percent have at least some college or an associate's degree. Forty-seven percent have a college or post-graduate degree. In addition, 90 percent of households owning DC accounts are under the age of 65 compared with 75 percent of all U.S. households (Table 4), and internet usage is greater for Americans under 65 (Tables 2 and 3).

TABLE 4

Households with DC Accounts Cover the Full Range of Age, Education, and Income Groups, But Are More Concentrated in "High-Access" Internet Groups

Percentage of U.S. households or percentage of households with DC accounts

DISTRIBUTION OF HOUSEHOLDS BY AGE, EDUCATION LEVEL, OR HOUSEHOLD INCOME	ALL U.S. HOUSEHOLDS	HOUSEHOLDS WITH DC ACCOUNTS
Age of head of household		
Younger than 35	20%	20%
35 to 44	17%	22%
45 to 54	18%	25%
55 to 64	19%	22%
65 or older	25%	10%
Education level of head of household		
No high school diploma	13%	5%
High school diploma/GED	26%	21%
Some college or associates degree	27%	27%
College or postgraduate degree	34%	47%
Household income		
Less than $20,000	16%	2%
$20,000 to $39,999	22%	11%
$40,000 to $59,999	17%	15%
$60,000 to $79,999	12%	16%
$80,000 to $99,999	8%	14%
$100,000 or more	24%	42%
All U.S. households	100%	100%

Source: Investment Company Institute tabulations of the Federal Reserve Board Survey of Consumer Finances (2016)

e. Internet usage for households owning DC accounts who fall within "lower-access" populations is still widespread. Only a relatively small percentage of households owning DC plan accounts fall into demographic categories that have lower internet usage (Table 4). Additional analysis reveals that these households use the internet at high rates, even if they are members of demographic groups that overall have lower usage of the internet ("lower-access" groups) (Table 5).

Because "lower-access" groups make up a small percentage of the DC plan account households, general statistics about "lower-access" groups do not reflect the households that actually have DC plan accounts. Households in these "lower-access" groups make up a small share of all households owning DC accounts. Only 2 percent of households owning DC accounts have household income under $20,000, and 11 percent have household income from $20,000 to $39,999 (Table 4). Only 5 percent of DC-owning households lack a high school diploma. Only 10 percent of households owning DC plan accounts are 65 or older.

Among households with DC accounts, such "lower-access" groups actually have high rates of internet usage; the vast majority indicate internet usage. For DC-owning households with household income under $20,000, 82 percent used the internet in 2016, while 79 percent used the internet among those with household income from $20,000 to $39,999 (Tables 3 and 5). DC-owning households with education of less than a high school diploma used the internet at a 76 percent rate in 2016. DC-owning households 65 or older used the internet at a 76 percent rate.

f. Even within "lower-access" groups, internet usage is significantly higher among households owning DC accounts than among the general population. Within each of the "lower-access" groups, households owning DC plan accounts use the internet at a higher rate than the general population. Fifty-seven percent of all U.S. households with an income under $20,000 used the Internet in 2016, while 82 percent of households with an income under $20,000 who are DC account owners used the internet (Table 5). Sixty-seven percent of U.S. households with household income from $20,000 to $39,999 used the internet, compared with 79 percent of households owning DC accounts with household income from $20,000 to $39,999. Forty-eight percent of U.S. households with no high school diploma used the internet in 2016, while 76 percent of households owning DC accounts with no high school diploma used the internet. Fifty-six percent of the all U.S. households who are 65 or older used the internet in 2016, compared with 76 percent of households owning DC accounts age 65 or older.

TABLE 5

"Lower-Access" Groups with DC Accounts Have High Rates of Internet Usage Than the "Lower-Access" General Population

Percentage of U.S. households or households with DC plan accounts by income, education, or age specified

INTERNET USAGE	INCOME – UNDER $20,000	INCOME – $20,000–$39,999	EDUCATION – NO HIGH SCHOOL DIPLOMA	AGE – 65 OR OLDER
Households owning DC plan accounts	82%	79%	76%	76%
All U.S. households	57%	67%	48%	56%
MEMO: All U.S. adults *(Percentage of U.S. adults in 2015)*	64%	80%	45%	32% with income less than $40,000 80% with income of $40,000 or more

Sources: Investment Company Institute tabulations of the Federal Reserve Board Survey of Consumer Finances (2016) and Data & Society (2015)

g. Comparison of 2010 and 2016 statistics for "lower-access" populations highlights significant increases since the time of the prior study. Use of the internet among households owning DC accounts in "lower-access" groups has increased since the time of the first study.[39] With regard to household income, 82 percent of U.S. households that earn less than $20,000 a year who own DC accounts used the internet in 2016, similar to 2013, but up dramatically from 56 percent in 2010 (Table 6). Seventy-nine percent of households who earn $20,000 to $39,999 who own DC accounts used the internet in 2016, up from 70 percent of this group in 2013 and 2010. As to education, 76 percent of households owning DC accounts without a high school diploma used the internet in 2016, up from 61 percent in 2013 and 57 percent in 2010. With regard to age, 76 percent of households age 65 or older who own DC accounts used the internet in 2016, up from 72 percent in 2013 and 63 percent in 2010.

TABLE 6

Internet Usage by "Lower-Access" Populations Has Increased Since the Prior Study

Percentage of households with DC plan accounts by income, education, or age specified

INTERNET USAGE BY DC ACCOUNT–OWNING HOUSEHOLDS	INCOME – UNDER $20,000	INCOME – $20,000–$39,999	EDUCATION – NO HIGH SCHOOL DIPLOMA	AGE – 65 OR OLDER
2010	56%	70%	57%	63%
2013	82%	70%	61%	72%
2016	82%	79%	76%	76%

Source: Investment Company Institute tabulations of the Federal Reserve Board Survey of Consumer Finances (2010, 2013, and 2016)

[39] The 2011 study examined the issue of whether to change the U.S. Department of Labor (DOL) regulations governing the choice between paper and electronic delivery of required information and notices to participants under the Employee Retirement Income Security Act of 1974 (ERISA), including in connection with DC plans, such as 401(k) plans. *See* Peter Swire and Kenesa Ahmad, "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery," *available at* https://ssrn.com/abstract=1960669.

2. Supplementary Information on Defined Contribution (DC) Plan Disclosures, Average Costs of Paper Delivery, and Average Contribution Rates for Participants Who Interact with the Plan Website

This supplement provides information based on regulatory requirements on the number and nature of disclosures that typically are sent to DC plan participants over the course of a year. In addition, it includes results from a survey of a cross-section of DC plan recordkeepers regarding the average cost of printing and mailing disclosures, the average length of the disclosures, and the average number delivered over the course of a year. The material ends with a discussion of average contribution rates for participants who interact with the plan website.

a. Information on DC plan disclosures reveals numerous documents are required to be sent to participants. There are many regulatory disclosures required of 401(k) plans, some are provided by the plan sponsor and some are provided by the plan recordkeeper on the behalf of the plan.[40] There are some disclosures, such as quarterly participant statements and the annual comparative chart of the plan's investment options and their fees, that must be sent by all 401(k) plans, and other disclosures that are sent periodically or as applicable (Table 7).[41] For example, a plan with automatic enrollment would send participants an Automatic Contribution Arrangement Notice and a Qualified Default Investment Alternative (QDIA) Notice. A plan entering a blackout period would have to send a Blackout Notice.[42] Current disclosure delivery practices involve electronic and paper delivery mechanisms, separate deliveries or combined deliveries depending on the timing of the disclosures, and plan sponsor or recordkeeper facilitation of the deliveries.

[40] For a discussion of the range of services, service providers, and service arrangements used in 401(k) plans, *see* Sean Collins, Sarah Holden, James Duvall, and Elena Barone Chism, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2016," *ICI Research Perspective* (June 2017), *available at* https://www.ici.org/pdf/per23-04.pdf.

[41] For more information, *see* "Reporting and Disclosure Guide for Employee Benefit Plans," U.S. Department of Labor, Employee Benefits Security Administration, *available at* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/reporting-and-disclosure-guide-for-employee-benefit-plans.pdf.; and Internal Revenue Service, "Retirement Topics - Notices," *available at* https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

[42] An individual account plan may impose a "blackout period" when participants are temporarily not able to take actions related to their account, such as diversify assets or take plan distributions.

TABLE 7

Common 401(k) Plan Required Notices

NOTICE	BRIEF SUMMARY OF REQUIREMENT
Quarterly Benefit Statements	401(k) plan participants must receive quarterly statements that indicate total benefits, the amount vested, and the value of each investment to which assets have been allocated.
Plan and Investment Fee Disclosure (404(a)(5) disclosure)	General information about the plan and potential administrative and individual costs, as well as a "comparative chart" of key information about plan investment options, must be furnished annually. On a quarterly basis, participants must receive a statement of the dollar amount of administrative and individual fees that were charged to their accounts. This information is typically included in the plan's quarterly benefit statements.
Summary Annual Report	A narrative summary of the Form 5500 must be provided annually.
Summary Plan Description (SPD) and Summary of Material Modifications (SMM)	The SPD, a summary of the plan terms, must be delivered to participants when they become covered by the plan, and, if there are no changes to the SPD, every 10 years thereafter. An updated SPD must be furnished every 5 years if changes are made to the SPD information. Material changes to the plan should be described in an SMM and furnished after the change is made; however, sending an updated SPD satisfies the SMM requirement.
Notices required, where applicable	
Automatic Contribution Arrangement Notice and Qualified Default Investment Alternative (QDIA) Notice	A plan that automatically enrolls participants must send a notice to inform participants of their rights and obligations under the arrangement, provided annually. Where the plan includes a default investment into a QDIA, a QDIA notice that describes the default investment and how to change the default investment must be provided upon eligibility and then annually. While these are two separate notice requirements, they may be combined.
401(k) Traditional Safe Harbor Notice	A "safe harbor" 401(k) plan (a plan design that uses set employer contributions and is not subject to the nondiscrimination tests) must provide a safe harbor notice when an employee first becomes eligible and annually thereafter.
Rollover notice (402(f) notice)	The notice must be provided to recipients of eligible rollover distributions from an employer plan within a reasonable period of time. The notice should be provided no less than 30 days and no more than 180 days before the distribution is to be made. The participant may waive the 30-day period.
Blackout Notice	Generally, must provide at least 30 days but not more than 60 days advance notice of blackout period.

Sources: Summaries based on "Reporting and Disclosure Guide for Employee Benefit Plans," U.S. Department of Labor, Employee Benefits Security Administration; and Internal Revenue Service, "Retirement Topics - Notices"

b. Costs for paper delivery could exceed $385 million. A recent survey of DC plan recordkeepers[43] finds the average cost for printing and mailing a single notice of four pages to one person is roughly $0.80, which if mailed, just once, to all 80.3 million 401(k) plan participants[44] would add up to more than $64 million (Table 8). With an average of a minimum of six mailings per year, total printing and mailing costs could exceed $385 million.[45] This assumes four quarterly statements and two regulatory notices, but it is common for plans to send four quarterly statements and four regulatory notices, which would increase printing and mailing costs to more than $500 million in a year.

TABLE 8

Costs of Paper Delivery According to Survey of a Cross-Section of 401(k) Plan Recordkeepers[46]

Average cost of printing and mailing a single notice of four pages to one person.	$0.80
Cost of mailing single notice once to 80.3 million 401(k) plan participants.	$64.24 million
The average number of disclosure deliveries in a year (from the recordkeeper).	6 to 8 deliveries
The average number of pages of all required notices to one person in a year.	18 to 20 pages

Sources: Investment Company Institute Survey of a Cross-Section of 401(k) Plan Recordkeepers and (number of 401(k) plan participants from) U.S. Department of Labor Form 5500 data

[43] The Investment Company Institute conducted the survey in the winter of 2017/2018 to gather information on printing and mailing costs from a cross-section of DC plan recordkeepers. Survey respondents provide recordkeeping services for more than 40 million 401(k) plan participant accounts in 2017. Responses were weighted by the number of participant accounts to construct an average.

[44] Based on Department of Labor summary statistics on 401(k) plans for plan year 2015, the total number of participants—including active participants and those who have separated from employment but still have accounts in the plan—was 80.3 million in plan year 2015. *See* U.S. Department of Labor, Employee Benefits Security Administration, Private Pension Plan Bulletin: Abstract of 2015 Form 5500 Annual Reports (February 2018; Version 1.0) *available at* https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2015.pdf.

[45] This estimate falls within the range previously estimated for the SPARK Institute. A report prepared for the SPARK Institute in 2015 found annual savings for shifting to electronic delivery for retirement plan notices of $300 million to $750 million per year. *See* "Improving Outcomes with Electronic Delivery of Retirement Plan Documents," *available at* www.sparkinstitute.org/content-files/improving_outcomes_with_electronic_delivery_of_retirement_plan_documents.pdf.

[46] Survey respondents provided recordkeeping services for more than 40 million 401(k) plan participant accounts in 2017. Responses were weighted by the number of participant accounts. Not all participants are mailed paper-copies of their disclosures and not all disclosures are provided by the recordkeeper (some are provided by the plan sponsor).

c. Average contribution rates for participants who interact with the plan website are higher than for participants who do not interact with the plan website. A subset of respondents to the DC plan recordkeepers survey were also able to report participant deferral rates among 401(k) plan participants who had interacted with the plan website compared with those participants who had not interacted with the plan website (Table 9). The average participant contribution rate among participants not interacting with the plan website was 5.8 percent of salary, compared with an average 7.8 percent contribution rate among participants who had interacted with their plan website.[47]

TABLE 9

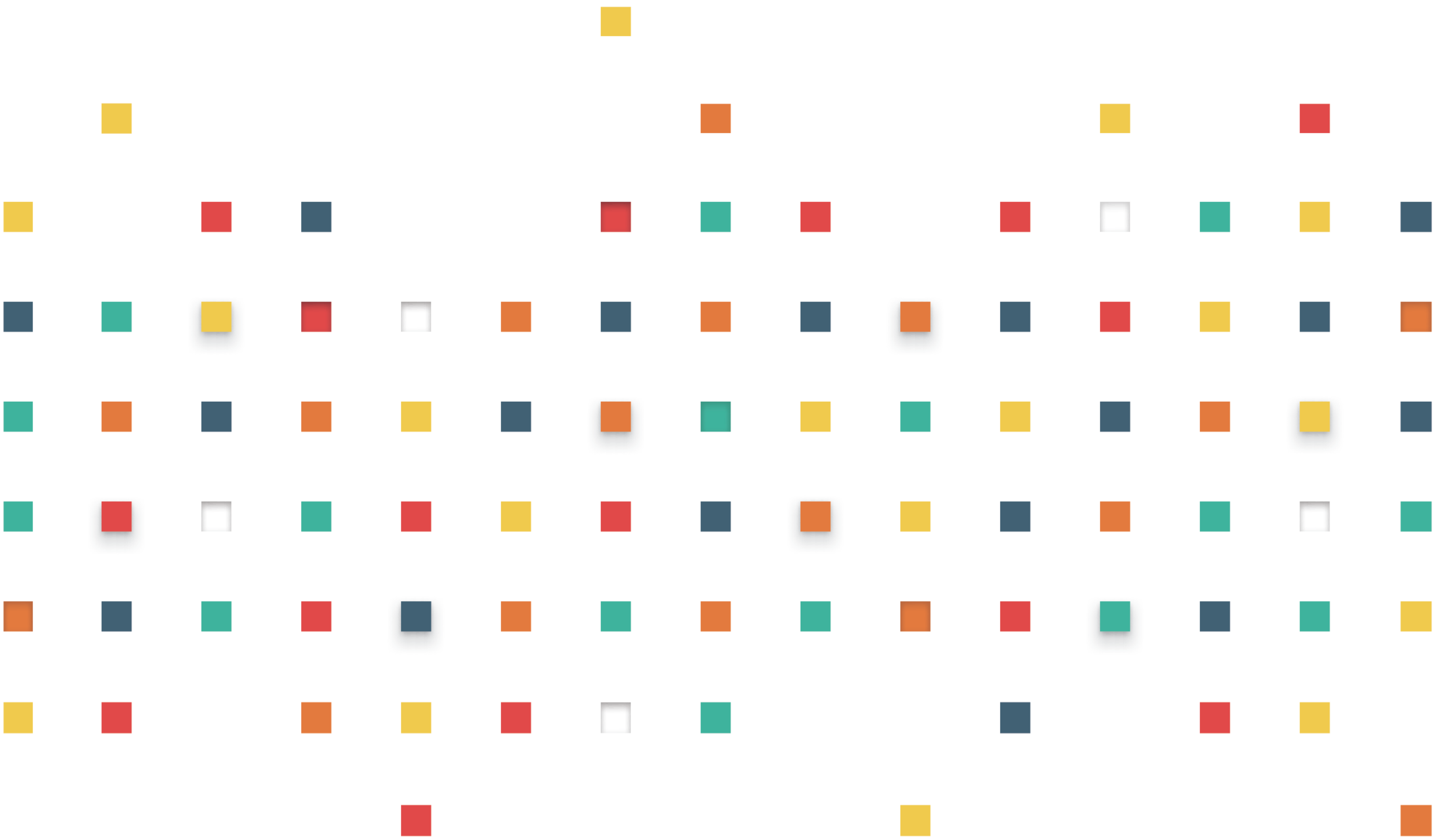
Average Contribution (Deferral) Rate for 401(k) Plan Participants According to Survey of a Cross-Section of 401(k) Plan Recordkeepers[48]

Participants interacting with the plan website	7.8%
Participants not interacting with the plan website	5.8%

Source: Investment Company Institute Survey of a Cross-Section of 401(k) Plan Recordkeepers

[47] Responses were weighted by the number of participant accounts among the subset of responding recordkeepers. *See* note 10 for a description of the recordkeeper survey.

[48] The results are based on a subset of recordkeepers that were able to provide data on this subject. *See* note 10 for a description of the recordkeeper survey.



RETIREMENT PLAN MODERNIZATION PROPOSALS

INVESTMENT COMPANY INSTITUTE®

MAY 11, 2018

RETIREMENT PLAN MODERNIZATION PROPOSALS

The Investment Company Institute supports the following proposals intended to improve the successful defined contribution plan system and better equip American workers with the tools needed to build a secure retirement. The proposals would expand coverage, participation, and savings rates in defined contribution plans and IRAs; improve the delivery and quality of information and education to plan participants and plan sponsors; enhance flexibility in determining how and when to tap retirement savings; and eliminate unnecessary burdens in plan administration so that plans can function more effectively.

EXPAND COVERAGE:
ESTABLISH NEW SIMPLER PLAN DESIGN

Current Law

Small employers have many different plan options to choose from: payroll-deduction IRAs, SEP IRAs (which allow only employer contributions), SIMPLE IRAs or SIMPLE 401(k) plans, as well as full-blown tax-qualified plans such as 401(k), profit-sharing, or defined benefit plans.

One such option—the SIMPLE IRA plan—is, as its name implies, a very simple plan to establish and maintain. It also has attractive employee contribution limits as compared to a regular traditional or Roth IRA ($12,500 vs. $5,500 in 2018). Under Internal Revenue Code ("Code") §408(p), employers with 100 or fewer employees who received at least $5,000 in compensation from the employer in the prior year may establish a SIMPLE IRA plan. The employer may not maintain any other retirement plan while maintaining a SIMPLE IRA plan. The employer can choose to cover all employees or only employees who received at least $5,000 in compensation during any two prior years and are reasonably expected to receive at least $5,000 during the current year. Employees may contribute up to $12,500 in 2018 (plus a $3,000 catch-up contribution for individuals age 50 or older). Employers must either match employee contributions 100 percent up to 3 percent of compensation or make a nonelective contribution of 2 percent of each eligible employee's compensation. All contributions must be fully vested. Each year, employees must receive notice of their rights under the plan, an election form, and a summary description. There is no annual reporting required (such as Form 5500), beyond reporting participation and contributions on an employee's W-2. The IRS provides model forms for establishment of a SIMPLE IRA plan, including a model notice to eligible employees and a model salary reduction agreement (*see* Forms 5304-SIMPLE and 5305-SIMPLE). Many financial institutions offering SIMPLE IRA plans use the IRS forms (although they could instead provide their own plan document). SIMPLE IRA plans generally are subject to Title I of the Employee Retirement Income Security Act ("ERISA"), but have more limited fiduciary obligations than a 401(k) plan for example.

Need for Improvement

While the SIMPLE IRA and many other plan options offer a relatively simple solution to plan sponsorship, none of the existing plan options work well for workplaces where the majority of workers are focused on saving for goals other than retirement—such as education, a home, or an emergency fund. Many small employers may like to offer employees the option to contribute to a 401(k) or similar plan, but cannot meet the non-discrimination tests and do not have the capacity to make the required employer contributions associated with the safe harbor 401(k) plan or a SIMPLE plan. For employers whose workforce places less value on compensation paid as retirement benefits, the required employer contributions discourage the adoption of SIMPLE plans.

Proposal

We propose a very modest change to current law that would build on the existing framework for SIMPLE plans.[1] In its simplest form, the new plan would work the same as the SIMPLE IRA, except that employer contributions would not be required and the employee deferral limit would be set lower than that for SIMPLE IRAs ($12,500 for 2018), but higher than the regular IRA contribution limit ($5,500 for 2018). To implement this change, Congress could amend Code §408(p) (Simple Retirement Accounts) to add an option with no employer contribution required and lower deferral limits. The IRS would revise certain existing guidance on SIMPLE IRAs (Notice 98-4) to reflect the new option, make any necessary conforming changes to IRS regulations, and revise their model forms to reflect the new option.

The Simpler plan should be an attractive, low-cost option for employers currently reluctant to offer a plan. Because the Simpler plan would be available only to small employers (100 or fewer employees)—the group least likely to currently offer plans—we believe the new option would not detract from the successful 401(k) system. Indeed, as these employers grow and become accustomed to the basic responsibilities of sponsoring a plan, they may be more inclined to step up to offering a 401(k) plan with its higher contribution limits and additional flexibility.

EXPAND COVERAGE:
EXPAND USAGE OF MULTIPLE EMPLOYER PLANS

Current Law

Most retirement plans subject to ERISA and the Code are "single employer plans" and are maintained by a single employer for its employees (and other employees of companies within the same "controlled group"). ERISA also allows multiple employers to sponsor a plan, as a sponsor of plan may include "…any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

The Department of Labor (DOL) has issued guidance analyzing when an entity may establish a single ERISA plan that covers multiple employers. Most of the guidance addresses associations, but some addresses other types of organizations (*e.g.*, financial institutions, franchises, employee leasing and professional service organizations). This guidance generally provides that for a single ERISA plan to exist, the employers that participate in the plan must be tied together by a common economic interest or organizational relationship unrelated to the provision of benefits.

[1] The new plan could be structured as either a SIMPLE IRA or a SIMPLE 401(k) plan, but we focus here on SIMPLE IRAs because very few employers that offer SIMPLE plans elect to use the SIMPLE 401(k) format. The draft language includes an amendment to Code section 401(k)(11) to allow for a Simpler plan under the SIMPLE 401(k) format.

To the extent there is no such relationship, each participating employer is treated as establishing and maintaining a separate employee benefit plan for its own employees.

In contrast to DOL guidance requiring a common interest or relationship between the participating employers, the Code provides special tax-qualification rules that accommodate plans sponsored by two or more employers that are not in the same controlled group or otherwise related. Under these rules, employers participating in the multiple employer plan are treated as one employer for certain purposes (*e.g.*, minimum participation testing; vesting) and as separate employers for certain other purposes (*e.g.*, nondiscrimination and minimum coverage testing; deduction rules). Current law provides that a violation of the Code's tax-qualification requirements by one participating employer in a multiple employer plan could result in the disqualification of the entire plan for all participating employers. For example, if one participating employer in a multiple employer plan fails to satisfy the top-heavy rules then the multiple employer plan may be disqualified for all of the employers in the plan.

Need for Improvement

Rulings[2] that preclude small employers from banding together to participate in a single retirement plan maintained by a single service provider impact the ability of small employers to gain the same efficiencies that larger employers enjoy. These efficiencies come in the form of reduced compliance and administrative burdens (*e.g.*, a single Form 5500, a single vendor relationship to manage). However, DOL guidance has essentially foreclosed the operation of retirement plans covering groups of unrelated employers under ERISA. In addition, employers are discouraged from joining a multiple employer plan by the Code provision providing that violations of qualification requirements by one participating employer disqualifies the entire plan.

Allowing small employers to participate in a single, multiple-employer ERISA plan (often referred to as a "MEP")—regardless of the employer's industry or any other preexisting relationship with other participating employers or the plan sponsor—will reduce administrative and compliance costs and burdens, and ultimately improve the availability of retirement plans to employees of small employers.

Studies have found that concern about administrative costs and burdens are a significant reason that more small businesses do not offer retirement plans. Small employers maintaining their own plan are required to prepare their own plan documents, summary plan descriptions and other participant disclosures, file individual Form 5500s, obtain a separate financial audit, and establish a single trust. Because of the fixed administrative costs of sponsoring a plan, small plans may not qualify for lower cost investment options or lower recordkeeping fees. Allowing multiple, unrelated small employers to participate in a single plan with reduced compliance and administrative burdens and centralized administration will reduce plan costs and help them obtain pricing similar to larger plans.

[2] *See* DOL Advisory Opinions 2012-03A and 2012-04A.

In addition to administrative and compliance burden, smaller employers may be challenged by the fiduciary responsibility and liability of selecting and monitoring service providers and plan investment options. By providing a level of liability relief for investment options offered under the plan, small employers would be encouraged to participate in a multiple employer plan, while at the same time ensuring that plan participants are protected.

Proposal

The proposal would amend the definition of "employee pension benefit plan" in ERISA to provide that a qualified multiple small employer plan ("QMSEP") will not fail to be treated as a single, ERISA-covered pension plan solely because contributing employers (meeting the definition of a "small employer") to the plan do not share a common economic relationship unrelated to the provision of benefits.

The QMSEP would be a multiple employer plan, as described in the Code and Treasury regulations thereunder, that is an individual account plan. The QMSEP would only be available to small employers. The term small employer would be defined as meaning any employer with no more than 100 employees who received $5,000 or more of compensation from the employer for the preceding year. If a participating employer fails to be an eligible employer for a subsequent year after participating in the plan for one or more years (including as a result of any acquisition, disposition or similar transaction), it would continue to be treated as an eligible employer for the five years following the last year the employer was an eligible employer.

Key legal protections for plan participants would be as follows –

- Employers would transfer fiduciary responsibility for selecting and monitoring plan investment options to the sponsor of the QMSEP, who would be the "named fiduciary."

- Participating employers in the QMSEP would retain fiduciary responsibility for the selection and monitoring of the QMSEP "named fiduciary." The named fiduciary would be permitted to delegate investment responsibility only to investment managers (who are by definition well-regulated professionals) as already permitted under ERISA. If the named fiduciary delegates its investment authority to an investment manager, the named fiduciary would remain liable for the prudent selection and monitoring of the investment manager. Importantly, as noted above, participating employers would be relieved of the liability of selecting and monitoring the particular investment options – an important incentive to join a QMSEP and offer a retirement plan to employees.

- The named fiduciary would be required to acknowledge in writing that he is a fiduciary to the QMSEP that is subject to all the requirements of ERISA. The named fiduciary, or its designee, would also be required fulfill the role of the QMSEP's "administrator," which means he ultimately would be responsible for all ERISA statutory disclosure responsibilities. The named fiduciary could delegate recordkeeping and other administrative functions to another entity.

- The named fiduciary would be required to register with the DOL and demonstrate to the DOL that it meets requirements related to fiduciary ability, capacity to account for the interests of a large number of individuals, fitness to handle funds, and rules of fiduciary conduct. These requirements would be similar to those that apply to non-bank trustees of individual retirement accounts.

- The DOL would have authority to conduct audits of the QMSEP's named fiduciary to ensure compliance with legal requirements. The named fiduciary would also be required to disclose to participating employers any pending or past (within the 24-month period preceding the named fiduciary's appointment) investigation or enforcement action by the DOL, Internal Revenue Service, or Securities and Exchange Commission concerning his conduct as a fiduciary or party in interest with respect to any plan, or any pending claims or final judicial adjudication or settlement with third parties for any violation of ERISA.

- All QMSEP assets would be required to be held in trust by a bank or trust company supervised by a State or Federal agency.

- The QMSEP would be prohibited from subjecting participating employers to unreasonable restrictions or fees, or any penalties, that restrict participating employers' ability to cease participation in, or transfer assets from, the plan. This requirement would not prohibit an investment fund from imposing fees or charges normally assessed to any shareholder or investor in the normal course of business, such as redemption fees.

- The QMSEP would include in its Form 5500 the name and identifying information of each participating employer. The DOL would be directed to provide regulatory guidance on how the SPD, Form 5500 and pension benefit statement requirements would apply in the case of a QMSEP.

In addition, the Treasury Department would be directed to prescribe final regulations under which a QMSEP may be treated as satisfying the tax Code qualification requirements despite the violation of those requirements with respect to one or more participating employers. The regulations could require that the portion of the plan attributable to the participating employers violating the qualification requirements be spun off into separate plans maintained by those employers.

Different variations of this proposal appear in the Retirement Security Act of 2017 (S. 1383, Collins, R-ME), the Retirement Security for American Workers Act of 2017 (H.R. 854, Buchanan, R-FL), the Small Businesses Add Value for Employees Act of 2017 (H.R. 4637, Kind, D-WI), and the Retirement Enhancement and Savings Act of 2018 (S. 2526, Hatch, R-UT and H.R. 5282, Kelly, R-PA).

INCREASE PARTICIPATION AND SAVINGS RATES: MODIFY EXISTING AUTOMATIC ENROLLMENT SAFE HARBOR AND OFFER ADDITIONAL AUTOMATIC ENROLLMENT SAFE HARBOR

Current Law

To encourage use of automatic enrollment, the Code includes a safe harbor that eliminates the need for a 401(k) plan to run complicated non-discrimination tests. The Pension Protection Act of 2006 created a new nondiscrimination safe harbor, known as a qualified automatic contribution arrangement (or QACA). A plan that adopts a QACA is deemed to have satisfied top-heavy requirements and the Actual Deferral Percentage (ADP) and Actual Contribution Percentage (ACP) nondiscrimination tests. The Code provides that to qualify as a QACA, employees must automatically be enrolled at an elective contribution equal to a "qualified percentage," defined to be met if the percentage is applied uniformly and is at least 3% for the first plan year beginning when the automatic contribution arrangement is established; at least 4% the subsequent year; at least 5% the year after that; and at least 6% for any subsequent year. While these percentages are minimums, the Code provides that a percentage exceeding 10% will not qualify as a QACA. The plan also must make a matching contribution to all non-highly compensated employees equal to 100% of elective contributions up to 1% of compensation, plus 50% of elective contributions between 1% and 6% of compensation. Alternatively, the plan can make a nonelective contribution equal to 3% of compensation. The matching contribution may be applied to both elective deferrals and employee contributions.

Need for Improvement

For plan sponsors that rely on the QACA safe harbor, the 10% ceiling is a barrier to escalating automatic contributions to levels that in some cases may be more appropriate for ensuring retirement adequacy. (In fact, even plan sponsors that do not rely on the QACA safe harbor often perceive the rule's 10% as a ceiling.) Accordingly, there is broad agreement across the retirement plan community for removing the 10% cap on automatic escalation deferral rates for plan participants.

In addition, while the QACA safe harbor has been applauded for encouraging the use of automatic enrollment, many plan sponsors believe that the default contribution levels are too low and that higher contribution levels are necessary to ensure a secure retirement for plan participants.

Proposal

Amend the safe harbor provisions in Code section 401(k)(13)(C)(iii) to remove the phrase "does not exceed 10 percent" and clarify that the qualified percentages are not maximums. As under current law, a participant would always be able to stop the escalation of his or her contribution rate at any time, select another percentage, or opt out of the plan. A plan sponsor could also set a maximum (but no lower than 6 percent).

Create a new automatic enrollment safe harbor—which would give employers another option alongside the QACA safe harbor—under which the default contribution would be at least 6% in the first year, at least 8% in the second year, and at least 10% in all subsequent years. There would be a 10% cap on the default level of contributions in the first year but no cap would apply thereafter. The employer would be required to make matching contributions equal to 50% of a participant's contribution up to 2% of compensation and 30% percent of elective contributions exceeding 2% of compensation, up to 10% of compensation. This arrangement "stretches" the current matching contribution to encourage participants to contribute at least 10% of pay. Like the QACA safe harbor, matching contributions could be applied to both elective deferrals and employee contributions. Nonelective contributions would not be allowed in this safe harbor. A tax credit also might be included to encourage small employers to adopt the new automatic enrollment safe harbor. Another incentive to adopt the new safe harbor could be the option to apply a three-year cliff vesting period to employer matching contributions. The current QACA safe harbor would not be affected.

The first proposal appears in the Retirement Plan Simplification and Enhancement Act of 2017 (H.R. 4524, Neal, D-MA), the Retirement Security Act of 2017 (S. 1383, Collins, R-ME) and in the Retirement Enhancement and Savings Act of 2018 (S. 2526, Hatch, R-UT and H.R. 5282, Kelly, R-PA). Variations of the second proposal appear in the Retirement Security Act of 2017 (S. 1383, Collins, R-ME) and in the Retirement Plan Simplification and Enhancement Act of 2017 (H.R. 4524, Neal, D-MA).

INCREASE PARTICIPATION AND SAVINGS RATES: INDEX IRA CATCH-UP LIMITS

Current Law

Tax law imposes contribution limits on all tax-advantaged retirement savings vehicles. In almost all cases, to ensure workers' ability to save for their future is not eroded by increases in the cost of living, contribution limits are automatically increased periodically to reflect inflation. Because many workers tend to enter and leave the workforce to raise children and because workers tend to have more income available to save for retirement later in their career, Congress in 2001 created "catch up" contributions for all of the important retirement savings vehicles. The catch-up contribution limit for 401(k), 403(b) and 457(b) plans are all inflation indexed. But the catch-up contribution limit for individual retirement accounts—which was last adjusted to $1,000 per year in 2006—is not.

Need for Improvement

Since their creation in 1974, IRAs have played a vital role in building retirement security for workers without access to a retirement plan at work, for small business owners, and for non-working spouses. The general contribution limit for IRAs is indexed so that its value is not eroded over time. The catch-up contribution limit for IRAs should also be indexed for inflation for the same reason, which simply brings it in line with catch-up contribution limits for those who save through workplace plans.

Proposal

Amend Code section 219(b)(5)(B) to provide that, in the case of any taxable year beginning after enactment, the $1,000 catch-up contribution amount will be adjusted for inflation from the year of enactment in the same manner as adjustments under IRC § 415(d). Although cost-of-living adjustments relating to retirement savings contributions typically are adjusted by multiples of $500, because of the small amount involved in this case, smaller increments could be used (such as $200). For example, any increase that is not a multiple of $200 will be rounded down to the next lower multiple of $200.

HELP PARTICIPANTS MAKE INFORMED DECISIONS: MODERNIZE E-DELIVERY DISCLOSURE RULES

Current Law

The IRS and the Department of Labor have no less than four separate regulatory standards that govern the circumstances under which an employee can be given a plan-related document electronically, and the four are not consistent with each other:[3]

- Treasury Regulations permit electronic delivery of notices and disclosures if a participant has the "effective ability to access" electronic media.
- Any disclosures required under ERISA can be made electronically (a) to a participant who has effective access to the document electronically at work and use of electronic information systems is an integral part of the participant's duties or (b) to a participant or beneficiary who offers affirmative consent.
- 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.

[3] Treas. Reg. § 1.401(a)-21; DOL Reg. § 2510.104b-1; DOL Field Assistance Bulletin 2006-03; DOL Technical Release 2011-03R.

- 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.

Need for Improvement

Allowing plans to make e-delivery the default method for communicating with participants (but allowing participants to opt for paper) will enhance the effectiveness of ERISA communications, maintain security of information, and produce cost savings for the economy and plans that decide to opt for e-delivery. Since adoption of DOL's electronic delivery regulation in 2002, internet usage has become virtually universal among most plan participants (approximately 93 percent of households with DC plans have internet access).

Proposal

Under the proposal, any document that is required by ERISA or the Code to be furnished to a participant, beneficiary or other individual (a "recipient") may be furnished electronically under a number of alternative methods:

- By direct delivery of the document to the recipient's email address.
- By posting on a continuously available website, if the recipient is notified that the document is available.
- Any other electronic means reasonably calculated to ensure actual receipt.

The proposal includes robust safeguards for participants who prefer to receive documents in paper form. Recipients must be informed of the right to request delivery of paper format, and a recipient who requests delivery of a paper document would be entitled to receive it. Any electronically furnished document must be presented in a manner that is consistent with the style, format, and content requirements applicable to the particular document taking into account the electronic form of the document, and the system must incorporate measures reasonably designed to protect personal information.

A similar proposal for modernizing the rules for electronic disclosure appears in the Receiving Electronic Statements to Improve Retiree Earnings Act of 2017 (H.R. 4610, Polis, D-CO).

HELP PARTICIPANTS MAKE INFORMED DECISIONS: CONSOLIDATE NOTICES

Current Law

Over the years, the number of notices that must be provided to participants and beneficiaries has exploded. When ERISA was enacted in 1974, Congress intended that one document—the summary plan description—would be the notice that informed participants of their rights and obligations. Since then, a large number of additional notices have been imposed on retirement plans under ERISA and the Code—now numbering more than 30 that apply just to retirement plans. Many of these notices must be provided upon enrollment and annually thereafter, although the specific timing requirements vary according to applicable regulations. The additional notices include:

- *Qualified default investment alternative notice*. *(ERISA §§ 404(c)(5)(B), 514(e)(3))*: Explains how a participant's account will be invested in the absence of an investment election by the participant.
- *Participant fee and investment disclosure*. *(DOL Reg. § 2550.404a-5)*: Provides participants in participant-directed individual account plans with key information about their plan and the investments available under the plan.
- *Safe harbor notice*. *(Code § 401(k)(12)(D))*: Informs participants that the employer will satisfy the Code's nondiscrimination requirements by making matching or nonelective contributions to the plan and explains participants' rights and obligations under the arrangement.
- *Autoenrollment safe harbor notice*. *(Code § 401(k)(13)(E))*: Informs participants in plans using the qualified automatic contribution arrangement safe harbor to satisfy nondiscrimination rules about their rights and obligations under the arrangement, including the default investment.
- *Permissive withdrawal notice*. *(Code § 414(w)(4))*: Informs participants in automatic enrollment plans that allow permissible withdrawals about their rights and obligations under the arrangement, including the right to stop automatic contributions and withdraw them within 90 days.

These notices, taken together, form a second "mini summary plan description" that explains key plan features that a participant might want to know to make the initial decision to enroll, including what happens if the participant takes no action. In practice, these notices may be provided as separate notices in the enrollment packet that employees receive on their first day of work.

Need for Improvement

In implementing these rules, the Departments of Labor and the Treasury have explicitly or implicitly discouraged combining these notices, even though together the notices provide interrelated information about a 401(k) plan's features. This discourages an integrated communication approach, complicates plan administration, and inundates participants with notices. Particularly with technical materials, more is often less effective, and the proliferation of notices, sent at different times, may serve to confuse many participants and cause many notices to be overlooked. In addition, the annual notice is in some cases unnecessarily tied to the plan year.

Proposal

A single notice (which could be referred to as the "Quick Start" notice) could combine the information currently in the following 11 notices:

1. Qualified default investment alternative notice (*ERISA § 404(c)(5)(B) and DOL Reg. § 2550.404c-5(d)*)
2. Notice of availability of cash or deferred election (*Treas. Reg. § 1.401(k)-1(e)(2)*)
3. Participant fee and investment disclosure (*DOL Reg. § 2550.404a-5*)
4. Safe harbor notice (*Code § 401(k)(12)(D) and Treas. Reg. § 1.401(k)-3(d)*)
5. ERISA automatic contribution arrangement notice (*ERISA § 512(d)(3)*)
6. Eligible automatic contribution arrangement notice (*Code § 414(w)(4) and Treas. Reg. § 1.414(w)-1(b)(3)*)
7. Qualified automatic contribution arrangement notice (*Code § 401(k)(13)(E) and Treas. Reg. § 1.401(k)-3(k)(4)*)
8. Automatic enrollment under eligible combined defined benefit and defined contribution notice (*Code § 414(x)(5)(B)*)
9. ERISA notice regarding availability of investment advice (*ERISA § 408(g)(6) and DOL Reg. § 2550.408g-1(b)(7)*)
10. Code notice regarding availability of investment advice (*Code § 4975(f)(8)(F)*)[4]
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. In addition, a number of notices have become redundant or irrelevant. The following notices would be eliminated:

- *Summary annual report* (*ERISA § 104(b)(3)*). This notice summarizes the annual report (Form 5500) filed by the plan with the Department of Labor, Internal Revenue Service, 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 provided to participants, which has specific information on the participant's account or benefits. In addition, the "Quick Start" will alert participants that they can request a copy of the annual report.
- *Deferred vested pension statement* (*Code § 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 § 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.

[4] The notice would continue to apply in the case of individual retirement plans and similar arrangements.

This proposal is a modified version of provisions in the Secure Annuities for Employee Retirement Act of 2013 (S. 1270, Hatch, R-UT) and the Retirement Plan Simplification and Enhancement Act of 2017 (H.R. 4524, Neal, D-MA).

HELP PARTICIPANTS MAKE INFORMED DECISIONS: MAKE PERFORMANCE DISCLOSURE FOR TARGET DATE FUNDS MORE EFFECTIVE

Current Law

In 2010, the Department of Labor finalized a regulation under ERISA section 404(a) requiring participants in participant-directed individual account plans to receive certain information about their plans and the investment options available under the plans. The rule is intended to ensure that all participants in such plans have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings. The regulation includes a requirement that the historical performance (1-, 5-, and 10-year returns) for each designated investment alternative for which the return is not fixed, be compared to an appropriate broad-based securities market index.[5] For example, for an equity fund, a plan would provide participants the 1-, 5-, and 10-year returns of the equity fund, alongside returns of an appropriate broad-based index (like the S&P 500, which represents the same asset class). This rule does not specifically address investments like target date funds that include a mix of asset classes. In the preamble to the final regulation and subsequent interpretive guidance,[6] DOL indicated that a plan could provide the required benchmark and *additional* benchmarks, so long as the additional benchmarks are not inaccurate or misleading. For example, for an investment option that has a mix of asset classes, an additional benchmark could be created by blending the returns of more than one appropriate broad-based securities market index. (The blended benchmark must proportionally reflect the actual holdings of the investment option.) The DOL benchmarking rule is based on a similar requirement under the securities laws for mutual fund prospectuses,[7] which requires a fund (in its prospectus) to compare its performance to an appropriate broad-based securities market index and allows comparison to another broad-based index, so long as the comparison is not misleading. In order to provide a blended benchmark index for a given investment option, if there is no appropriate broad-based index that reflects a mix of asset classes, the disclosure materials may need to include at least two different benchmarks for the option, which could confuse participants and unnecessarily lengthen the disclosure.

Need for Improvement

In the context of DOL's participant disclosure rule (in which key information, such as performance and fees, about each designated investment option under a plan must be provided in

[5] DOL Reg. § 2550.404a-5(d)(1)(iii).
[6] *See* 75 Fed. Reg. at 64916-17; Field Assistance Bulletin 2012-02R, Q&A-16.
[7] *See* Form N-1A, Item 27(b)(7).

a comparative format so that participants can directly compare the options and allocate their investments among them), providing two different benchmarks for a target date fund, for example—one that tracks the fund's allocation and one that does not—detracts from the usefulness of the comparative chart. For purposes of the comparative chart, plans should have the option to provide a single benchmark that tracks the asset allocation of the particular fund, so that participants can make more focused comparisons of the different investment alternatives available to them.

Proposal

DOL would be directed to modify its participant disclosure regulation so that an investment that uses a mix of asset classes can be benchmarked against a blend of broad-based securities market indices, provided (a) the index blend reasonably matches the fund's asset allocation over time, (b) the index blend is reset at least once a year, and (c) the underlying indices are appropriate for the investment's component asset classes and otherwise meet the rule's conditions for index benchmarks. (These conditions are important to prevent the blended benchmark from being manipulated.)

This proposal appears in the Retirement Plan Simplification and Enhancement Act of 2017 (H.R. 4524, Neal, D-MA) and in the Secure Annuities for Employee Retirement Act of 2013 (S. 1270, Hatch, R-UT).

PERMIT GREATER FLEXIBILITY FOR RETIREMENT SAVERS: UPDATE REQUIRED MINIMUM DISTRIBUTION RULES

Current Law

Workers are required to begin taking distributions from qualified retirement plans and IRAs at age 70½. These "required minimum distributions" were first added to the Code in 1962 to prevent business owners from using retirement vehicles for estate planning. Congress has since applied the RMD rule to virtually all tax-advantaged retirement accounts, but has never reexamined the required beginning age to reflect changing patterns of retirement savings or increases to life expectancy.

Need for Improvement

Research shows that workers tend to roll their retirement savings into IRAs at retirement, where they tend to preserve them until the law *forces* a distribution.[8] According to the Social Security Administration's Period Life Expectancy Table, the life expectancy of a person aged 65 in 2014

[8] *See* Sarah Holden and Daniel Schrass, "The Role of IRAs in U.S. Households' Saving for Retirement, 2017," *ICI Research Perspective* 23, no. 10 (December 2017); available at https://www.ici.org/pdf/per23-10.pdf.

is about five years longer for men and about four and a half years longer for women than it was in 1962 (when the 70½ rule was first added).[9] In fact, with a married couple both aged 65 in 2000, there is a 72% chance that one will live to age 85 and a 45% chance that one will live to age 90.[10]

Proposal

Amend Code section 401(a)(9) to increase the required beginning age from 70½ to at least 75, and permit those receiving RMDs to stop if they have not yet reached the new required beginning age.

This proposal is a modified version of a proposal in the Retirement Plan Simplification and Enhancement Act of 2017 (H.R. 4524, Neal, D-MA).

PERMIT GREATER FLEXIBILITY FOR RETIREMENT SAVERS: ELIMINATE MAXIMUM AGE FOR TRADITIONAL IRA CONTRIBUTIONS

Current Law

Individuals who reach age 70½ before the close of a taxable year may not make contributions to a traditional IRA for that year.

Need for Improvement

In view of the variability in how individuals save throughout their working lives, the increases to life expectancy discussed above, and the corresponding potential for individuals to continue working past traditional retirement age, the law should not prevent workers aged 70½ and older from continuing to save for retirement.

Proposal

Amend Code section 219(d) to repeal paragraph (1) and make conforming changes.

This proposal appears in the Retirement Enhancement and Savings Act of 2018 (S. 2526, Hatch, R-UT and H.R. 5282, Kelly, R-PA).

---

[9] *See* 2014 OASDI Trusties Report Table V.A3. Period Life Expectancy, Social Security Administration, available at www.ssa.gov/oact/TR/2014/lr5a3.html#hist and 2017 OASDI Trustees Report Table V.A4. Period Life Expectancy, Social Security Administration, available at https://www.ssa.gov/oact/TR/2017/V_A_demo.html#226697.

[10] *See* Plan for a Long Retirement, available at https://personal.vanguard.com/us/insights/retirement/plan-for-a-long-retirement-tool.

IMPROVE PLAN ADMINISTRATION: EXPAND EMPLOYEE PLANS COMPLIANCE RESOLUTION SYSTEM

Current Law

Under a literal reading of applicable law, certain imperfections in a plan document or any single failure to operate a plan in accordance with the plan's written terms disqualifies the entire plan and trust, resulting in severe income tax consequences to innocent participants. The IRS' Employee Plans Compliance Resolution System (EPCRS) allows qualified plans and 403(b) plans to correct inadvertent errors in a plan document or plan administration without unnecessary tax consequences befalling innocent participants. It is widely recognized as a very successful program.

Under the program, certain errors can be self-corrected by the plan; other errors require a voluntary correction filing (called VCP) which can be expensive to prepare and which can take a long time for the IRS to process.

Need for Improvement

Because the IRS releases updates somewhat infrequently and because of limited IRS resources, EPCRS has not kept up with the ever growing complexity of plan administration.

In particular, a common error that requires a VCP filing is the correction of a single loan error. The cost of correcting a loan error typically would be less than the cost of the VCP filing itself. Similarly, it would be helpful to permit self-correction of missed required minimum distributions within a reasonable time frame.

There currently is no correction program available for errors relating to IRAs.

Proposal

Treasury would be directed to modify EPCRS:

- to allow for self-correction of loan errors (directing the Secretary of Labor to treat any loan self-corrected under EPCRS as also meeting the requirements of Labor's voluntary correction program);
- to allow self-correction, without an excise tax, of a required minimum distribution that is made within 180 days after the distribution was required to be made from the plan;
- to provide the same comprehensive program of correction for governmental 457(b) plans; and
- to expand EPCRS to allow custodians of IRAs to address inadvertent errors for which the individual owner was not at fault (including waiver of the excise tax for failure to make

required minimum distributions; and inadvertent rollovers, such as a rollover by a nonspouse beneficiary or a rollover from a non-governmental 457 plan).

This proposal appears in the Retirement Plan Simplification and Enhancement Act of 2017 (H.R. 4524, Neal, D-MA) and in the Secure Annuities for Employee Retirement Act of 2013 (S. 1270, Hatch, R-UT).

IMPROVE PLAN ADMINISTRATION: SIMPLIFY 403(b) TERMINATION

Current Law

In 2007, Treasury and IRS completed a comprehensive overhaul of the regulations governing 403(b) plans. For the first time, the regulations provided that a 403(b) plan may be terminated. But the regulations provide only limited guidance regarding the mechanics of plan termination. When a 403(b) plan is invested in annuities, the termination can occur through distribution of a fully paid annuity contract to the participants. When the 403(b) plan is invested in regulated investment companies in a custodial account (as the Code allows), the administrative process is more difficult. When a participant can be located and responds to communication from the plan, the account can be rolled over into an IRA. It is inevitable, however, that there will be participants who are either not located or unwilling to voluntarily liquidate their existing 403(b) accounts, perhaps because they prefer their current investment provider or because of sales charges. The problem of missing participants is particularly problematic in the context of 403(b) plans because these plans are often funded through a number of different vendors. Many participants will hold contracts issued by vendors that do not have a current relationship with the employers. The IRS issued a ruling in 2011 (Rev. Rul. 2011-7) that appears to require an election by the participant to distribute funds in the custodial account, which is often not possible to obtain.

Need for Improvement

Unlike with 401(k) and other qualified plans, the Code does not provide a process for terminating 403(b) plans, which has left the IRS with little guidance. Providing an orderly process for termination which protects participants and maintains the tax qualified nature of the account is consistent with prior Congressional efforts to harmonize the rules for 403(b) plans with qualified plans. Providing for the "in-kind" distribution of a custodial account to a participant upon plan termination, so that the account retains its 403(b) status outside of the plan, also would provide parity for 403(b) participants who invest in mutual fund custodial accounts and want to remain invested in the same vehicle after plan termination, just like 403(b) annuity contract holders who can maintain their contract after plan termination.

Proposal

The proposal would provide that if an employer terminates a 403(b) plan under which amounts are contributed to a custodial account, an account of a participant or beneficiary shall be considered "distributed" for plan termination purposes if the account is distributed "in-kind" to the participant or beneficiary (in which case amounts actually distributed from the account will be taxed in the year in which so distributed under Code section 72, unless rolled over to another qualified account). A custodial account would not be considered "distributed" to a participant or beneficiary if the employer has any material retained rights under the account, but the employer would not be treated as retaining material rights simply because the custodial account was originally opened under a group contract.

This proposal appears in the Retirement Plan Simplification and Enhancement Act of 2017 (H.R. 4524, Neal, D-MA). A different proposal relating to 403(b) plan termination appears in the Retirement Enhancement and Savings Act of 2018 (S. 2526, Hatch, R-UT and H.R. 5282, Kelly, R-PA).

STRENGTHEN SOCIAL SECURITY: PLACE SOCIAL SECURITY ON SOLID FINANCIAL FOOTING FOR THE INDEFINITE FUTURE

The foregoing proposals would go a long way toward improving the successful defined contribution plan system and better equipping American workers with the tools needed to build a secure retirement. Any assessment of the US retirement system is incomplete, however, without recognizing the significance of Social Security. Social Security provides the foundation of retirement security for almost all American workers—for the majority, it may be the largest single income source in retirement—and it replaces significant portions of income for lower-income retirees. In this respect, Social Security replaces 85 percent of average inflation-indexed annual earnings for workers in the lowest lifetime household earnings quintile; 55 percent for workers in the middle lifetime household earnings quintile; and 34 percent for workers in the highest lifetime household earnings quintile.[11] Yet the Social Security system faces a projected long-term imbalance.

It is absolutely imperative to preserve Social Security as a universal, employment-based, progressive safety net for all Americans. ICI urges Congress to strengthen Social Security and maintain its current character. We do not support proposals to transform Social Security benefits into individual private accounts.

[11] Figures represent the mean replacement rates for retired workers in the 1950s birth cohort, assuming the workers claim Social Security benefits at age 65. *See* Exhibit 10 in Congressional Budget Office, *CBO's 2014 Long-Term Projections for Social Security: Additional Information* (December 2014); available at www.cbo.gov/publication/49795.