

November 7, 2019

The Honorable Preston Rutledge
Assistant Secretary for Employee Benefits
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Ste. S-2524
Washington DC 20210

Re: Requested Clarification of Guidance on Plan Expenses

Dear Assistant Secretary Rutledge:

The American Retirement Association (ARA) is a national organization of more than 26,000 members who provide a wide variety of services to American employers and sponsors of retirement plans, including investment advice, retirement plan consulting and administrative services. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is comprised of five premier retirement industry associations; the American Society of Pension Professionals & Actuaries (ASPPA), the ASPPA College of Pension Actuaries (ACOPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), and the Plan Sponsor Council of America (PSCA).

Our members are proud of the important work they do, including providing high quality, professional services to ERISA-covered retirement plans. They are passionate about helping plans better serve participants and improving participant outcomes. In striving toward these goals, our members recognize the need to educate participants on financial security, particularly on principles of investing and retirement savings. Just as significantly, they understand the importance of providing education to participants and plan sponsors regarding retirement savings generally and retirement plan innovations. Indeed, they understand that continuous innovation in plan design by policymakers and industry leaders holds the promise of improved retirement preparedness for millions of workers.

Plan Service Providers Play a Vital Role as Sources of Information and Education

The Department of Labor's (DOL's) mission statement and outreach initiatives reflect a recognition that participants as well as plan sponsors and other fiduciaries benefit from education about saving for retirement and about ERISA plans.¹ The ARA's members

¹ <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/mission-statement>.

are similarly aware of these needs and have firsthand experience with how heavily plan clients rely on their service providers for a wide array of information related to retirement plans, regardless of the provider's established responsibilities. Indeed, clients often favor leveraging existing business partners for information ranging from investment advice to plan structure and retirement readiness programming for participants. ARA members have also found that clients believe receiving ancillary information from plan service providers is concomitant with the professional services rendered.

DOL's recognition of the need for participant education on retirement savings and other financial matters is not new. In 1996, when it issued Interpretive Bulletin 96-1, the DOL described a concern the Department, employers and others -- that many participants may not have a sufficient understanding of investment principles and strategies to make their own informed investment decisions.² At that time, concerns regarding participants' financial literacy were amplified because "[w]ith the growth of participant-directed individual account pension plans, more employees [we]re directing the investment of their pension plan assets and, thereby, assuming more responsibility for ensuring the adequacy of their retirement income." Since that time, participants' understanding of financial concepts -- retirement savings in particular -- have continued to be a concern. For example, in 2007, a Working Group of the ERISA Advisory Council³, acknowledged that many participants may not have a sufficient understanding of investment principles and strategies to make their own informed investment decisions. The consensus of the Working Group was that plan sponsors -- a primary conduit of relevant information to participants -- need more education regarding best practices for "assisting employees/plan participants with obtaining and increasing financial literacy."

ARA believes that providing education to participants about financial health and retirement savings in particular, supports the policy goal of enhanced retirement security. Financial educational programs for participants help them assess their needs and evaluate their options for the future. With the assistance of new technologies, plan sponsors have implemented retirement readiness education as part of the retirement benefits program offered, in order to promote savings and tailor decumulation strategies to participants.

Just as significantly, ARA believes that being able to discuss with plan sponsors retirement plan features which are beneficial to participants is not only important, but entirely consistent with the DOL's public policy goals. Our members are dedicated professionals with years of

² 61 Fed. Reg. 29586 (June 11, 1996).

³ Advisory Council Report of the Working Group on Financial Literacy of Plan Participants and the Role of the Employer, <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2007-financial-literacy-of-plan-participants-and-the-role-of-the-employer#7>

experience working with ERISA plans and other employee benefits. For many of their small and medium-sized clients, administering a retirement plan is one of many responsibilities. This makes service providers' responsiveness, including to questions outside the scope of their established responsibilities, vitally important. For example, an investment advisor who is asked by a plan sponsor about measures to increase participation might discuss automatic features and how they work as well as their understood effect on plan participation. This might occur even though consultation on plan design is not part of the formal service arrangement. ARA believes that apprising a plan sponsor of plan design features like auto-enrollment and auto-escalation supports the goals of building retirement savings. Well-informed plan sponsors are more likely to choose advantageous plan features suitable to their particular employee population, which may lead to increased participation and participant savings.

DOL Guidance Relating to Plan Expenses

The ARA believes that expenses of retirement readiness programs and those relating to beneficial plan design features like auto-enrollment and auto-escalation should be payable, if the plan sponsor elects, from plan assets. Programs and plan features like these support the policy goals of achieving increased retirement plan participation and savings. In today's regulatory climate, however, these programs as well as the adoption of many optional plan designs and features popular with employers and employees are not legally required and would be considered "discretionary." A typical scenario involves a service provider that charges a fee which is paid out of plan assets. Under the DOL's existing guidance on reasonable expenses of plan administration, participant education or plan design discussions with a plan sponsor could not be part of these paid services. In other words, for service providers that are paid out of plan assets, there are practical implications of the view that any discussion relating to plan design is a settlor expense, for instance, even simply discussing pros and cons of automatic plan features. The result is that the expenses attendant to considering popular design features or of providing educational programs are not payable out of plan assets, causing employers, especially small employers, to forego them, even when they might generate tremendous benefits for employees.

The central interpretive issue in this context is the treatment of expenses which are auxiliary to the primary service provided. ARA believes that these expenses should be treated as plan expenses in consideration of the potential benefits to plans and its participants. Any concurrent benefits to the plan sponsor would be incidental and not impermissible under the principles expressed in Advisory Opinion 2001-01A (AO 2001-01)⁴.

⁴ Adv. Op. 2001-01 (Jan. 19, 2001).

The ARA is aware of recent EBSA enforcement cases in which investigators have taken the view that if a service provider discusses any plan design issues with its client, some portion of the usual fees are attributable to settlor functions. The result is that the plan sponsor would pay these costs from their own assets. If the approach taken in these recent enforcement cases were correct (and, as discussed below, we believe it is incorrect), service providers must choose between not providing answers to questions about automatic enrollment, for example, and revising existing service agreements with all of their plan clients to establish an alternative, non-plan asset payment method for what would typically be de minimis amounts (and difficult to quantify). The ARA believes that the DOL should clarify that under the principles of AO 2001-01, limited plan design discussions with service providers that benefit participants and financial educational programs for participants are permissible as payable out of plan assets as correlative to increased retirement savings.

Clarification Sought

The ARA is seeking clarification of the views expressed by DOL in AO 2001-01 and the related hypothetical fact patterns to permit the use of plan assets to pay for certain limited service provider interactions involving plan design and participant retirement education where they are auxiliary to the primary service.⁵ The ARA intends to request an Advisory Opinion from the DOL on this matter. Specifically, the updated Advisory Opinion would treat these as reasonable expenses of plan administration under the following circumstances:

- **Providing participant education and/or plan design information is auxiliary to the provider's primary service:** The ARA agrees that a service provider who is engaged to assist a plan sponsor in designing a plan is engaged in settlor activity. However, when a service provider, such as a third-party administrator or an investment advisor, merely provides participant education or provides information to a plan sponsor regarding automatic enrollment, or on an occasional basis, answers a question involving a plan design matter, it is auxiliary to their established service and involves a de minimis amount of their time.
- **The interactions are reasonable and necessary:** Taking into account participant needs in developing investment recommendations is a reasonable and necessary activity for a plan investment advisor. It is also reasonable for plans and their advisors to understand and provide means to increase plan participation among eligible employees, such as education and communications outreach. Discussing features like these with a plan fiduciary should not raise a question about whether it is settlor

⁵ The ARA understands Advisory Opinions to be "pre-enforcement rulings" under Section 2(d) of the Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents (Oct. 9, 2019) and therefore, not subject to new requirements in the Executive Order for significant guidance documents.

activity, given the minimal amount of time such a discussion entails compared to the investment advisors' overall services to the plan.

- **The service provider's compensation for its services is reasonable:** If the service provider charges a reasonable fee for its services or does not receive explicit compensation, and is not increasing its fees or otherwise seeking additional compensation from the plan for any questions about plan design, the DOL should treat it as uncompensated service and not require a determination of the allocable "cost" of the conversations and require new service arrangements allocating this de minimis costs to the plan sponsor.
- **Any benefit flowing to the plan sponsor is incidental:** Any benefit flowing to the plan sponsor must be incidental and should be evaluated in light of the attendant benefits to the plan and its participants. For example, automatic enrollment and automatic escalation clearly benefit the plan and plan participants. When there are no additional charges by the service provider for providing information about these features, costs are not shifted in favor of the sponsor—that is, plan expenses are not increased with a corresponding decrease to settlor expenses.

Conclusion

The ARA very much appreciates the DOL's commitment to expanding access to workplace retirement savings plans for America's workers. The ARA shares this goal and looks forward to working with the DOL on the important issues of education for participants as well as for plan sponsors. New beneficial plan designs such as automatic enrollment and a desire to provide more in-depth financial education programs are recent trends that post-date the last guidance issued in this area. As explained in the foregoing, we intend to request an Advisory Opinion explaining that these vital conversations may continue. Additionally, we are requesting to meet with you to discuss these matters at your earliest convenience.

Sincerely,

/s/ Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/ Will Hansen, Esq.
Chief Government Affairs Officer
American Retirement Association

/s/ Allison Wielobob, Esq.
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cc:

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