

April 3, 2019

Mr. Larry Good
Executive Secretary
ERISA Advisory Council
U.S. Department of Labor
Suite N-5623
200 Constitution Avenue NW
Washington, D.C. 20210

Re: Expenses Payable from Plan Assets

Dear Mr. Good:

The American Retirement Association (“ARA”) respectfully requests that the ERISA Advisory Council examine the topic of the Department of Labor’s (“DOL”) outstanding guidance concerning the extent to which an ERISA-covered retirement plan may pay the costs attendant to a sponsor’s decisions about plan design and other features to encourage retirement savings.

The ARA is a national organization of more than 25,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. 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 the coordinating entity for its five underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (“ASPPA”), the ASPPA College of Pension Actuaries (“ACOPA”) the National Association of Plan Advisors (“NAPA”), the National Tax-Deferred Savings Association (“NTSA”), and Plan Sponsor Council of America (“PSCA”). ARA members are diverse but united in a common dedication to America’s private retirement system.

The ARA has long supported efforts to make it easier for working Americans to increase their retirement savings. Employer-sponsored retirement plans have proven to be the most effective way to facilitate long-term savings among working Americans. Since the advent of the Employee Retirement Income Security Act of 1974 (“ERISA”), regulatory and legislative changes have aimed to make it easier for employers to establish retirement plans and for employees to participate in them more effectively. The historical growth in plan participation rates among workers reflects improvements in plan designs and features which are in large part attributable to these changes. Continuous innovation in plan design by policymakers and industry leaders holds the promise of improved retirement preparedness for millions of workers. For example, as the 401(k) plan has assumed a greater role in Americans’ retirement planning, convenience and effectiveness of 401(k) saving for employees has been stimulated by auto-enrollment and auto-escalation features that help workers save meaningful amounts in individual account plans. In addition, with the assistance of new technologies, plan sponsors have implemented retirement

readiness programs within retirement plans that promote savings and tailor decumulation strategies to participants.

Amidst this dynamic, plan sponsors have to balance the costs of realizing beneficial plan changes for plan participants against their likely benefits. Under current DOL guidance, plan assets may be used for expenses relating to plan amendments required to maintain a plan's tax-qualification ("legally-required amendments") but the employer must pay for costs of any plan changes which are made discretionarily – those which are treated as nonfiduciary "settlor" decisions.¹ In today's regulatory climate, however, the adoption of many optional plan designs and features popular with employers and employees, such as automatic enrollment and QDIAs, are not legally required and would be considered "discretionary" under DOL guidance. As a result, the costs of amending the plan to establish such popular design features and retirement readiness programs are not payable out of plan assets, causing employers, especially small employers, to forego plan amendments due to their associated costs, when the features potentially will generate tremendous benefits for employees.

The ARA is concerned that under current DOL guidance, adoption of beneficial ERISA plan design features is undermined by the costs employers bear in implementing them. The ARA encourages the ERISA Advisory Council to examine this topic and consider recommending that the DOL review its interpretation of reasonable uses of plan assets.

We appreciate the opportunity to recommend a topic for the ERISA Advisory Council to review. If you have any questions regarding this recommendation, please contact Will Hansen, Chief Government Affairs Officer, at whansen@usaretirement.org or 703-516-9300.

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.
General Counsel
American Retirement Association

¹Department of Labor's Advisory Opinion 2001-01A (January 18, 2001)