THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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# TESTIMONY BY THE ERISA INDUSTRY COMMITTEE TO THE U.S. SENATE FINANCE COMMITTEE HEARING ON

## BUILDING ON BIPARTISAN RETIREMENT LEGISLATION: HOW CAN CONGRESS HELP?

Chairman Wyden, Ranking Member Crapo, and Members of the Senate Finance Committee, thank you for the opportunity to testify before the Committee on behalf of The ERISA Industry Committee (ERIC) on how to Congress can help to continue building bipartisan legislation to help American workers save for retirement. ERIC's voice is unique as the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC's member companies are leaders in every industry sector and provide comprehensive retirement and health benefits to tens of millions of active and retired workers and their families across the country. As such, ERIC has a strong interest in policies that impact employers' ability to provide cost-effective retirement programs and the ability of employees to receive such benefits and enjoy a secure retirement.

ERIC member companies are working hard to keep their businesses viable, protect workers and their jobs, and tailor employee benefits to the needs of their workforce, even enhancing them to address needs during the pandemic, as allowed by law. Each member company has different workforce needs, but changes in The Employee Retirement Income Security Act of 1974, as amended (ERISA) would help all of them support their workers and their workers' retirement security. ERIC appreciates the efforts of this Committee to provide much-needed aid to retirement plan participants and plan sponsors in the SECURE Act in 2019 and to address COVID-19 pandemic-related concerns in the Coronavirus Aid, Relief, and Economic Security (CARES) Act and in the American Rescue Plan Act of 2021.

ERIC member companies want to expand saving opportunities for workers and optimize resources for retirement savings. We look forward to working with this Committee as the country recovers from the pandemic and focuses on these longer-term needs.

An essential part of the recovery from the pandemic is to increase retirement security. Providing opportunities for greater savings into retirement plans play a significant role in increasing retirement security for workers – particularly those who have suffered recent financial stress. To expand retirement savings for workers, ERIC recommends the enactment of the following provisions:

- ***Increase the age for required minimum distributions*** to age 75

- Treat ***student loan payments*** as elective deferrals for the purpose of employer matching contributions
- Provide a safe harbor for the ***recovery of retirement plan overpayments***
- Allow for ***emergency savings accounts*** as part of retirement savings plans
- ***Provide additional savings opportunities for those close to retirement*** by the increasing catch-up limits in plans
- ***Modify the definition of a Highly Compensated Employee (HCE)*** to encourage the inclusion of employees who meet the definition but are not on an executive or management level
- ***Expand cafeteria plans*** to allow participants additional pre-tax benefit options such as student loan repayment, disability insurance, long-term care insurance, longevity insurance, and retirement planning services
- ***Strengthen Retiree Health Care*** by extending Internal Revenue Code section 420

Employers voluntarily offer retirement plans for their workers, expending significant resources to provide retirement benefits. As such, ERIC urges Congress to pass legislation that will allow these employers to optimize resources by eliminating unnecessary administrative burdens. Specifically, we recommend the enactment of the following provisions:

- ***Simplify reporting and disclosure requirements*** by eliminating redundant and unnecessary disclosures
- ***Maintain electronic disclosure as a default distribution***
- ***Establish an Office of Retirement Savings Lost & Found*** within the Pension Benefit Guaranty Corporation (PBGC) that would serve as a repository for information about all lost retirement accounts accessible through a searchable online database
- ***Prevent raising single-employer PBGC premiums*** to pay for non-retirement legislation
- ***Protect ERISA preemption*** in efforts to increase retirement coverage

Below, we provide further details on our recommended provisions to increase retirement security and reduce administrative burdens on plan sponsors. We note when the recommendations have previously been introduced.

**Increase the age for required minimum distributions to age 75.**[1] The required minimum distribution (RMD) rules are aimed at preventing individuals from using their qualified plans and IRAs to accumulate significant assets for future generations. However, the current RMD rules too rigidly affect smaller account balances and the flexibility needed to provide effective annuity-like income distribution options that support more successful retirement outcomes. Therefore, we support increasing the required beginning date from 70-1/2 to age 75.

**Treat student loan payments as elective deferrals for the purpose of employer matching contributions**. Many Americans are interested in obtaining higher education and

[1] Retirement Security and Savings Act – Section 108, https://www.congress.gov/bill/117th-congress/senate-bill/1770/text; Securing a Strong Retirement Act of 2020 - Section 105 https://www.congress.gov/bill/117th-congress/house-bill/2954/text – Increases the required beginning date to either age 73, 74, or 75 depending on the individuals age at the time of distributions.

are burdened with the cost of attending school. Nearly 44 million people owe $1.7 trillion in federal student debt, making it difficult for some to save for retirement.[2] Employers are interested in helping these employees save for their futures by establishing student loan matching programs. In 2018, the IRS issued a Private Letter Ruling (PLR-131066-17) allowing a 401(k)-plan sponsor to contribute to a 401(k) plan on behalf of plan participants who pay down student loan debt but do not necessarily contribute to the employer's 401(k) plan.[3] Since the PLR applies only to the employer who receives the letter, Congressional action is necessary to allow other employers to support their workers in this way. To solve this matter through legislative action, Congress should pass the Securing a Strong Retirement Act, which includes Chairman Wyden's Retirement Parity for Student Loans Act (S. 1443).[4] The legislation would permit 401(k), 403(b), SIMPLE and governmental 457(b) retirement plans to make matching contributions to workers as if their student loan payments were salary reduction contributions. As such, recent graduates who cannot afford to save money beyond their student loan repayments would no longer have to forego the employer match and can start to build retirement savings while paying down their student loan debt.

**Provide a safe harbor for the recovery of retirement plan overpayments.** Plan sponsors have a fiduciary obligation to ensure that retirement plans are adequately funded and that every participant receives the benefits that have been promised. Overpaying benefits to certain plan participants can undermine these efforts. On the other hand, plan sponsors do not want to burden retirees with paying back amounts that were mistakenly overpaid, especially de minimis amounts. However, it is unclear whether plan sponsors can forego the recoupment of benefit overpayments without violating their fiduciary duties. As such, ERIC supports legislation that would provide a safe harbor to allow well-funded plans to forego recoupment of overpayments that were not the fault of the retiree.[5]

**Allow for emergency savings accounts as part of retirement savings plans.** Short-term financial needs and risks create significant financial stress for employees, undermine their productivity, and interfere with their retirement savings. According to a report by Bankrate.com, 26 percent of all Americans have no emergency savings, and people between 30 and 49 are more likely than any other age group to have no emergency savings.[6] On top of this, the Urban Institute computes that the value of Americans' retirement accounts has shrunk from over $18 trillion in 2019 to roughly $14 trillion in 2020.[7] Clearly, there is a need to encourage both

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[2] "Consumer Credit – G-19" Federal Reserve https://www.federalreserve.gov/releases/g19/current/default.htm.
[3] "Private Letter Ruling (PLR-131066-17)," Internal Revenue Service https://www.irs.gov/pub/irs-wd/201833012.
[4] Retirement Security and Savings Act; Securing a Strong Retirement Act of 2020.
[5] Retirement Security and Savings Act – Section 322 https://www.congress.gov/bill/117th-congress/senate-bill/1770/text; Securing a Strong Retirement Act of 2020 – Section 301 https://www.congress.gov/bill/117th-congress/house-bill/2954/text. We note that the IRS has recently issued guidance in this area as well in Revenue Procedure 2021-30. While we appreciate this effort, we believe that providing a legislative solution will avoid potential changes in different Administrations.
[6] Carlozo, Lou. "How Does Your Emergency Fund Compare? New Stats Reveal Americans' Raiy Day Savings Habits. Money Under 30. December 18, 2019. https://www.moneyunder30.com/compare-average-emergency-fund-savings.
[7] Farrell, Chris "Analysis: The Pandemic is Making America's Reitrement Cirsis Worse. Here's What You Can Do. PBS News Hour. April 30, 2020. https://www.pbs.org/newshour/economy/analysis-the-pandemic-is-making-americas-retirement-crisis-worse-heres-what-you-can-do.

emergency and retirement savings. ERIC believes that it is crucial to recognize the holistic and lifetime nature of financial well-being (including retirement) and strengthen the connections between short-term financial concerns and adequate savings for retirement.

As such, ERIC supports The Enhancing Emergency and Retirement Savings Act of 2021, which would provide up to $1,000 from a retirement savings account to be used for personal emergencies.[8] Allowing participants access to savings for emergencies will encourage participation in retirement programs – particularly for those who may be hesitant to "lock away" money in case they will need it later. Plan sponsors and service providers have been actively developing tools to educate workers on the importance of saving and retirement readiness through financial wellness programs and other measures. We believe this legislation complements the private sector efforts by providing additional ways for employees to handle their financial responsibilities.

**Provide additional savings opportunities for those close to retirement by the increasing catch-up limits in plans**. In balancing short-term and long-term financial needs, it is important to give workers greater flexibility about exactly which year they make elective deferrals. For example, older workers should have the opportunity to make higher elective deferrals to 401(k) plans than is possible under current law in recognition that:

(i) In some earlier years, they and their families may have had important financial needs they reasonably prioritized ahead of elective deferrals, and;

(ii) A dollar contributed at a younger age will generate a larger retirement benefit at retirement age than a dollar contributed at a later age.

Therefore, we support legislation that increases the catch-up amount for those who are close to retirement.[9]

In addition, we believe that workers of all ages should be provided with some flexibility in making elective deferrals to 401(k) plans during times of unpaid leave. The catch-up contributions would be in the amount that would have been allowed if payments were continued during that time. Furthermore, upon making the catch-up contribution, the participant should receive all matching contributions that would have been otherwise made.

**Modify the definition of a Highly Compensated Employee to encourage the inclusion of employees who meet the definition but are not on an executive or management level**. A vital component of these nondiscrimination rules is the definition of an employer's HCEs. This definition must achieve an appropriate policy balance—enough of the employer's leadership/management employees should be HCEs so that the employer will have a strong incentive to maintain a qualified plan that also benefits significant Non-Highly Compensated

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[8] Enhancing Emergency and Retirement Savings Act of 2021. https://www.congress.gov/bill/117th-congress/senate-bill/1870/text?q=%7B%22search%22%3A%5B%221870%22%5D%7D&r=2&s=1

[9] Retirement Security and Savings Act – Section 120 https://www.congress.gov/bill/117th-congress/senate-bill/1770/text; Securing a Strong Retirement Act of 2020 – Section 107 https://www.congress.gov/bill/117th-congress/house-bill/2954/text.

Employees (NHCEs). But not too many of the employer's employees should be HCEs, or else too many of them will be inappropriately limited in the contributions they can make or receive under the plan, particularly in a 401(k) plan.

Not surprisingly, employers' workforces reflect the economic, business, geographic, and labor contexts within which they operate. The current coverage and nondiscrimination rules were initially developed based primarily on what is perhaps the most common, straightforward employer and workforce structure – a single organization operating in a single business line with a workforce characterized from a compensation distribution perspective by a pyramid image (i.e., small group of employees at the "high-paid top" of the pyramid with increasingly larger groups of employees as compensation decreases from the "high-paid top" toward the "lowest-paid base" of the pyramid). However, many companies have moved away from this pyramid model. Instead, the workforce structure is flatter, with a significant number of highly paid employees at the base with only another layer or two of decision-makers above the base.
In 1996, Congress adopted a modification to the HCE definition to better recognize employers with a high proportion of highly paid employees without undercutting the critical coverage and nondiscrimination policies. The change allows an employer to limit the employees treated as HCEs because they had compensation above the statutory compensation threshold ($125,000 for 2019) compared to those employees who were also in the top-paid 20 percent of all the employer's employees by compensation.[10] While this change is helpful, it requires another update to keep pace with changing workforce structures. For some employers with certain workforce structures, in certain high-compensation industries (e.g., technology or financial services), and in certain high cost-of-living locations, even the top-paid 20 percent HCE option will result in a larger HCE group than is appropriate. To further improve the HCE definition to address these situations, we propose that an employer be permitted to limit the employees earning over the annual compensation HCE threshold who are treated as HCEs for the current year to the top-paid ten percent group of employees by compensation.

**Expand cafeteria plans to allow participants additional pre-tax benefit options such as student loan repayment, disability insurance, long-term care insurance, longevity insurance, and retirement planning services.** Cafeteria plans can be effective vehicles for employers to offer and employees to address key short-term financial needs and risks. They are also used to purchase key insurance benefits such as disability insurance, long-term care insurance, longevity insurance, and retirement planning services. These benefits and coverages could be bought under the cafeteria plan on a pre-tax basis. As such, ERIC supports making these benefits qualified benefit options for cafeteria plans.

**Strengthen Retiree Health Care By Extending Internal Revenue Code Section 420.** We urge Congress to extend Section 420 of the Internal Revenue Code (the "Code"), which will continue bipartisan legislation that encourages continued funding and vesting of employer-provided retiree welfare benefits.[11] Section 420 allows employers with generously overfunded pension

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[10] The Small Business Job Protection Act of 1996, Pub. Law 104–188, Section 1431. https://www.congress.gov/bill/104th-congress/house-bill/3448

[11] Section 405(a) of S. 1770, the *Retirement Security and Savings Act of 2021*, as introduced by Senators Cardin (D-MD) and Portman (R-OH) and co-sponsored by Senators Hassan (D-NH) and Collins (R-ME), would extend Section 420 for six years, from the end of 2025 to the end of 2031.

plans to use a portion of the plans' surplus assets to fund retiree welfare benefits (health care benefits and group life insurance coverage) for the plans' retirees without jeopardizing the security of the underlying pension promise. These retiree welfare transfers benefit both employers and retirees. They provide a funding source for retiree welfare benefits (which, unlike pensions, are not subject to funding requirements) and also effectively require the employer to continue to provide the underlying retiree welfare benefits for a stated number of years after the transfer, making Section 420 the only provision in ERISA or the Code that statutorily vests retiree welfare benefits. Section 420 was originally enacted in 1990 on a temporary basis and is currently set to expire at the end of 2025. It has been subject to numerous extensions, on a bipartisan basis, in advance of its then-scheduled expiration.[12] These transfers are good retirement policy and good fiscal policy and should be extended. [13]

**Simplify reporting and disclosure requirements by eliminating redundant and unnecessary disclosures**. The Tax Code and ERISA include many rules requiring and governing the reports, disclosures, and notices that employers and qualified plans must provide to employees and participants. We believe that these communications are complex, burdensome, and costly and are less informative or effective for employees and participants than they should be. ERIC agrees with proposals that direct the DOL, Treasury, and the PBGC to issue regulations to consolidate and simplify the existing ERISA and tax reports, notices, disclosures, and other information relating to deferred compensation, pension, profit-sharing, and other retirement plans. [14] In developing these regulations, the agencies should consult with the appropriate stakeholders and organizations (including sponsors, plans, administrators, recordkeepers, communication experts, and others) to identify problems, areas of possible improvement, and approaches to improvement. The agencies should review the efficacy and ability to combine summary plan descriptions, summary annual reports, summary of material modifications, single employer annual funding notices, fee disclosures, QDIA/safe harbor notices, Section 402(f) rollover notices, participant account statements, securities-related disclosures, distribution options (including lifetime annuity estimate disclosures, choices around risk transfer transactions), and other communications to employees and participants.

**Maintain electronic disclosure as a default distribution.** ERIC's member companies invest considerable time and expense providing and improving communications to participants, beneficiaries, and others and have found that electronic communications offer significant advantages to plan sponsors, administrators, participants, and beneficiaries. Therefore, we were very supportive of the changes made by the DOL that allow plan sponsors to provide electronic delivery as the default option for providing retirement plan notices. This regulation significantly

[12] Most recently, Section 420 was extended in the *Surface Transportation and Veterans Health Care Choice Improvement Act of 2015* (the "2015 Act"). Pub. L. No. 114-41, Sec. 2007 (2015). At that time, Section 420 was scheduled to expire at the end of 2021 but was extended to the end of 2025. The 2015 Act had overwhelming bipartisan support (it received votes of 91-4 in the Senate and 385-34 in the House) and was signed into law by President Obama.

[13] Notably, extending Section 420 also raises revenue (transfers for retiree welfare benefits replace deductible corporate payments for these same benefits), allowing funding of a variety of spending and other priorities. The 2015 Act, which extended Section 420 for four years, raised $172 million over the 10-year budget window.

[14] Retirement Security and Savings Act – Section 301 https://www.congress.gov/bill/117th-congress/senate-bill/1770/text; Securing a Strong Retirement Act of 2020 – Section 304 https://www.congress.gov/bill/117th-congress/house-bill/2954/text.

eased administrative burdens for plan sponsors by allowing them to modernize their notice delivery systems and move into the 21st century, and importantly allowed them to target delivery more appropriately offer notices and information more quickly, and provide beneficiaries an opportunity to act on information provided with embedded links, website access, etc. Consequently, one point of concern in recent legislation is the attempt to roll back recent advances in electronic delivery flexibility.[15] We encourage Congress to allow plan sponsors to provide retirement notices in the same manner as other notices and information, including those provided by the government. At the very least, if Congress decides that an annual disclosure is necessary, it should be a short and generic notice - i.e., a "postcard notice" - which can be provided more easily and quickly than an annual benefit statement.

**Establish an Office of Retirement Savings Lost & Found within the Pension Benefit Guaranty Corporation (PBGC)**. ERIC's member companies care significantly about the participants and beneficiaries in their employer-sponsored plans. They put tremendous resources and funds into these retirement plans and want each participant to benefit fully from these plans. As such, plan sponsors want all participants to be found and receive their hard-earned retirement benefits. ERIC member companies work hard to find all participants but there are still missing retirement plan participants and recalcitrant participants who remain out of contact or stubbornly refuse to commence their benefits (or cash checks once received). This challenge has been compounded by the termination of the IRS and Social Security Letter Forwarding Program. This challenge is also expected to grow, given that today's workers tend to switch jobs more frequently.[16] Although plans of all sizes deal with missing participant issues, ERIC's large employer members are especially likely to face these challenges because their plans tend to be larger and more complex with more significant acquisition histories (including acquisitions where a plan has inherited incomplete records).

ERIC's members are, therefore, incredibly supportive of solutions that address this issue. An Office of Retirement Savings Lost & Found would serve as a repository for all "lost" retirement accounts accessible through a searchable online database,[17] that participants could utilize to find former employers and determine whether they have retirement accounts from which they could receive distributions. Such a database would be beneficial in ensuring that participants receive the benefits that they have earned and, thereby, decrease the number of missing participants.

**Stop unnecessary and harmful PBGC premium increases that are implemented as part of a budget gimmick and outside of established policy procedures**. Congress mandated that PBGC's mission is "to encourage the continuation and maintenance of voluntary private pension plans," but increased premiums drive employers away from the defined benefit system. In rapid succession, and without input from the Committees of jurisdiction or a policy justification for the increases, Congress increased premiums for single-employer plans from $31/person in 2007 to

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[15] Securing a Strong Retirement Act of 2020 – Section 313 (b)(2) https://www.congress.gov/bill/117th-congress/house-bill/2954/text.

[16] Also, auto-enrollment usage has increased due to the 2006 Pension Protection Act and successfully brought many more participants into the employer-provided system. However, the increased number of plan participants also increases the challenges associated with missing and unresponsive participants.

[17] Retirement Security and Savings Act – Section 323 https://www.congress.gov/bill/117th-congress/senate-bill/1770/text; Securing a Strong Retirement Act of 2020 – Section 306 https://www.congress.gov/bill/117th-congress/house-bill/2954/text.

$86/person in 2021 – an increase of $55/participant over 14 years, compared to an increase of only $30 over the previous 32 years. In addition, Congress subjected these rates to annual increase by indexing them to inflation. Congress raised PBGC premiums even though neither PBGC nor the Administration called for an increase, and the single-employer program was already adequately funded. As a result of these needless increases made in the dead of night, many plan sponsors are deciding to exit the system by dropping or freezing their defined benefit plans, or disallowing benefits for new workers. In 2018, there were 5.5 million fewer participants in the single-employer system than in 2014. And the ever-increasing PBGC premiums are one of the reasons employers are terminating these plans.[18] For those employers that are not completely terminating, others have decided to de-risk either by offering lump sums or purchasing annuities for select groups, which lowers their PBGC premiums but deprives these individuals of ERISA's protections.[19] By the PBGC's own estimates, the PBGC's trust fund for the single-employer system does not pose any immediate or long-term threat of default. In fact, the PBGC's 2020 Annual Report shows that the single-employer program is overfunded by $15.5 billion and is projected to have a $46.3 billion surplus by 2029. Any increase in PBGC premiums at this point would be entirely unrelated to PBGC's or participant needs. [20] Therefore, we urge Congress to pass legislation that prevents increasing single-employer PBGC premiums without a full and fair review.[21]

**Expand the Ability of Plans to Self-Correct Plan Errors.** Plan sponsors and administrators should be permitted to play a more significant role in identifying and correcting plan errors, including excess, insufficient, and missed contributions, compensation and service, accrued benefit, and other determinations and calculations. In particular, employers should be allowed greater opportunities to self-correct routine, common operational, and plan document mistakes without the need for the incurrence of fees and federal agency oversight and approval. To this end, expanding the Employee Plans Compliance Resolution System (EPCRS) and the Voluntary Fiduciary Correction Program (VFCP) would increase compliance and reduce the cost of plan administration without adversely affecting participants' benefits.[22]

**Protect ERISA preemption in efforts to increase retirement coverage**. The ability of large employers to follow a single set of federal rules is critical to their ability to provide benefits to their workers, families, and retirees across the country. As different states have set up retirement programs for their private citizens, ERIC has been vigilant in protecting ERISA preemption and ensuring that employers who voluntarily provide retirement benefits can do so on a uniform

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[18] See "PBGC Single-Employer Premiums and Their Impact on Plan Sponsorship," American Academy of Actuaries, October 2020 available at https://www.actuary.org/sites/default/files/2020-10/PBGCPremiumsIB.pdf.
[19] See the 2018 Annual Report of the Participant and Plan Sponsor Advocate citing Mercer's study on de-risking available at https://www.pbgc.gov/sites/default/files/pbgc_advocate_report_2018.pdf.
[20] PBGC's 2020 Annual Report at https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2020.pdf. In fact, decrease in such premiums is very much needed to prevent a downward spiral in which healthy companies are effectively forced out of the system, leaving PBGC with less healthy companies to support it, which are the very companies that are at risk for needing the PBGC's support.
[21] See The Pension and Budget Integrity Act of 2019 which creates a budget point of order for any provision that increases single-employer pension program premiums payable to the PBGC.
[22] Retirement Security and Savings Act – Section 115 https://www.congress.gov/bill/117th-congress/senate-bill/1770/text; Securing a Strong Retirement Act of 2020 – Section 307 https://www.congress.gov/bill/117th-congress/house-bill/2954/text.

basis.[23] ERIC does not oppose state efforts to provide retirement plan options to for workers without access to an employer-provided retirement plan but opposes any attempt to mandate reporting or other obligations on companies that offer a federally-regulated retirement plan. ERIC has successfully worked with all state retirement programs to ensure that our member companies are not burdened by reporting requirements that infringe upon ERISA's preemption laws. We will continue advocating on the federal, state, and local levels to protect large employers' ability to design and administer retirement plans unique to their workforces without mandates that violate federal law.

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You will note that many of these provisions that ERIC supports and recommends were included in the Retirement Security and Savings Act by Senators Cardin and Portman.[24] ERIC applauds the leadership of these members of Congress in recognizing the continued need to focus on retirement security. Some newer measures and modifications are needed to ensure that workers in all industries and in all workplaces can fully achieve retirement security.

ERIC and our large employer plan sponsors look forward to continuing to work with you and other interested parties to advance these measures and explore additional provisions that can be included to further promote retirement security for working Americans. Thank you for the opportunity to share our ideas. If you have any questions, do not hesitate to contact me at arobinson@eric.org or by calling 202-789-1400.

[23] In 2017, ERIC filed a lawsuit requesting that the Oregon Retirement Savings Board halt the reporting requirement because it violates ERISA preemption. https://www.eric.org/uploads/doc/legal/ERIC%20v%20Oregon%20Retirement%20Savings%20Board.pdf. ERIC and OregonSaves reached a settlement agreement by which ERIC members are automatically exempt from the reporting requirements of the OregonSaves employer exemption process.

[24] Many of these provisions are also included in the Securing a Strong Retirement Act of 2021 (SSRA) which was introduced by Ways and Means Committee Chairman Neal and Ranking Member Brady in the House.