

## ERISA and Internal Revenue Code Considerations for Financial Well-Being Texting Programs: Participant Engagement & Education Is Key to Maximizing Retirement Savings

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### Executive Summary

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The purpose of this white paper is to describe the impact that two federal laws that govern retirement plans—the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and the Internal Revenue Code of 1986, as amended (the “Code”)—have on the delivery of investment education information to participants in ERISA-covered retirement plans through texting programs used in conjunction with those retirement plans (the “Program”).

The Program is an engagement and communication platform that enables employers to provide strategic content designed to engage employees who are participating in employer-sponsored employee benefit plans, with the goal of facilitating retirement savings success and financial well-being.

#### The key areas of the Program that ERISA and the Code may impact are:

- **Opting in vs automatic enrollment:** The Program will allow its customers to choose whether participants opt in to the Program or their employer automatically enrolls them.
- **Investment advice vs. education:** Fiduciary status can result from providing investment advice, but not from providing only investment education information.
- **AI:** The Program will use artificial intelligence (“AI”) to gain insight about the Program’s effectiveness, track the outcomes of interactions, measure specific metrics like financial literacy, and collect user surveys and interviews.
- **Collection and use of participant data:** The Program should take measures to protect participant data from unauthorized disclosures, such as data breaches.

#### The key conclusions in this white paper are:

- **Texting programs can help plan sponsors** drive employee and participant engagement with financial and other educational information leading to positive outcomes for their employees related to their overall financial well-being.
- **Texting programs can help fiduciaries comply with their fiduciary obligations** to provide participants with investment education information.
- **Texting programs are effective.** Recent studies indicate that individuals across generations prefer text messaging for communication.<sup>1</sup> For this reason, different generations of Americans, including baby boomers, millennials, and generation Z are more likely to engage with and respond to texted information, compared to historical forms of communication.<sup>2</sup>
- **Automatically enrolling participants** enables plan sponsors to reach all employees.
- **The Program is designed to comply** with ERISA, including DOL cybersecurity guidance, incorporates the general privacy protections required by federal law. It also satisfies the texting and privacy requirements of the TCPA and federal securities laws.
- **Because of its unique methodologies,** the Program represents the next chapter in the evolution of participant engagement, education and financial well-being.

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<sup>1</sup> See *54 Business Texting Statistics You Should Know*, AVOCHATO (Nov. 13, 2022), <https://blog.avochato.com/54-text-messaging-stats-every-business-should-know-avochato>.

<sup>2</sup> 29 C.F.R. § 2550.404c-1.

