October 10, 2023

Submitted electronically via www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Request for Information—SECURE 2.0 Reporting and Disclosure (RIN 1210-AC23)

Dear Sir or Madam,

On behalf of the American Benefits Council ("the Council"), I am writing in response to the Request for Information (RFI) published by the U.S. Department of Labor (DOL) to solicit public feedback on several sections of the SECURE 2.0 Act of 2022 that affect reporting and disclosure requirements under the Employee Retirement Income Security Act of 1974 (ERISA).

The enactment of SECURE 2.0 was a significant achievement for retirement security, and we look forward to working with DOL and sharing our views as DOL takes steps to implement the provisions that are the subject of the RFI. The Council appreciates that DOL is initiating its work on these important SECURE 2.0 provisions in an open and transparent manner. Although our responses below primarily focus on what guidance Council members have identified as necessary or helpful in their implementation of the changes in law, we also highlight below our particular concern with the RFI's indication that DOL may consider conditioning the continued use of its electronic disclosure safe harbors on a participant's "access in fact."

The Council is a Washington, D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors

of health and retirement benefits for virtually all Americans covered by employer-provided plans.

Our comments on the questions and possible agency actions raised in the RFI are set forth below.

REQUIREMENT TO PROVIDE PAPER STATEMENTS IN CERTAIN CASES

Section 338 of SECURE 2.0 requires retirement plan administrators to deliver certain benefit statements on paper in written form, unless an exception applies. In the case of defined contribution plans, benefit statements must be furnished on paper at least once a year. In the case of DB plans, benefit statements must be furnished on paper at least once every three years unless an annual notice is provided regarding the availability of a benefit statement. The two exceptions to this paper delivery requirement are: (1) in the case of plans that furnish benefit statements under the 2002 electronic delivery safe harbor; and (2) in the case of plans that permit recipients to request benefit statements to be furnished electronically, if the recipients request that such statements be delivered electronically and the statements are so delivered. Section 338 also requires DOL to make certain updates to its 2002 and 2020 electronic delivery safe harbors.

Access in Fact (RFI Question #21)

DOL asks in the RFI whether the 2002 and 2020 safe harbors should be modified so that their continued use by plans is conditioned on "access in fact." In this regard, DOL asks whether, if technology permits, the safe harbors should include a condition that plan administrators monitor whether individuals actually visited or logged onto the specified website. DOL further asks whether, in the event that such monitoring reveals individuals have not taken such action, the safe harbors should require that plan administrators revert to paper disclosures or take some other action with respect to individuals whom administrators "know forsake such access."

The Council strongly recommends against conditioning the continued use of the 2002 and 2020 safe harbors on access in fact.[1] Even when technologically feasible to do so, plan administrators should not be required to monitor participants' website activity any more than they should be required to monitor whether a participant opens their paper mail, let alone reads the contents inside. Further, DOL has not offered any evidence that participants are more likely to read paper disclosures than electronically furnished documents. Plan administrators have a responsibility to furnish certain plan

[1]Although the focus of our comments in this letter is on pension plan disclosures, which are clearly the focus of Section 338 of SECURE 2.0, we note that DOL's 2002 safe harbor is also available for health and welfare plan disclosures. Thus, any changes to the safe harbor beyond what was contemplated by Congress in SECURE 2.0 could have much broader implications, and it is not clear from the RFI that DOL has taken those broader implications into account.

information to participants, and as long as the applicable furnishing standards are met—whether by paper or through electronic means—the plan administrator's responsibility very appropriately and necessarily ends at that point.

Congress debated Section 338 intensely during the SECURE 2.0 deliberations, with extensive input from stakeholders and the agencies, including DOL. Congress made specific changes and directed that certain issues be reviewed, none of which related to access in fact. Accordingly, it would be clearly inconsistent with congressional intent, and inconsistent with the open process that Congress engaged in, for DOL to suddenly revisit a core element of the rules that Congress just examined and modified.[2]

It would also be strikingly harmful to impose the access in fact standard that DOL describes, both in terms of increased costs and decreased benefits, and DOL has provided no cost-benefit analysis of its own to provide evidence otherwise. An access in fact standard would increase costs dramatically in two ways. First, paper is far more expensive than electronic delivery. A study found:

> We calculate that switching to an electronic delivery default would produce $250 to $450 million in aggregate savings annually that would accrue directly to individual retirement plan participants. … Empirical estimates indicate that these cost savings attributable to default electronic delivery could improve participant retirement security by 9 percent during the accumulation phase.[3]

An "access in fact" condition would also be very expensive to implement for those that do not have that capability today, as DOL itself has recognized.[4]

On the benefits side, the cited Quantria Strategies study found that:

> [P]rovider evidence demonstrates that participants receiving plan communications electronically have better retirement outcomes and default electronic delivery could improve retirement readiness for countless others. … Estimates indicate that plan

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[2] *See* Letter from Virginia Foxx, Chairwoman of the U.S. House of Representatives Comm. on Educ. and the Workforce, to Lisa Gomez, Assistant Sec'y of the U.S. Dep't of Labor Emp. Benefits Sec. Admin. (Oct. 5, 2023), *available at* https://edworkforce.house.gov/uploadedfiles/10.5.23_final_electonic_delivery_letter_to_dol.pdf.

[3] Quantria Strategies, *Default Electronic Delivery Works: Evidence of Improved Participant Outcomes from Electronic Delivery of Retirement Plan Documents* (November 2019), at 2. *Available at* https://www.sparkinstitute.org/wp-content/uploads/2019/12/SPARK-Institute-Default-Electronic-Delivery-Works-public-version.pdf

[4] Fed. Reg. 31884, 31900 (May 27, 2020) ("DOL does agree, however, that imposition of a monitoring requirement could be very expensive, especially for small plans, to the extent technological systems have to be replaced or altered significantly, or additional, potentially costly, plan services have to be procured. Even the most basic requirement for website monitoring, for example tracking the instances of users visiting a particular page on a website or views of a screen on an app, would require a web analytics tool, according to the commenters.").

participants could increase their final account balance by 63 percent with modest increases in their deferral rate which provider data indicates can be accomplished with electronic communication nudges and engagement with online tools.

We are all sensitive to the effects of fees on retirement savings. In that context, it is surprising and disappointing that we are even considering the massive increase in costs attributable to an access in fact standard, especially in light of Congress' recent legislative work on this issue, none of which contemplated an access in fact standard.

2002 Safe Harbor (RFI Question # 19)

Section 338 of SECURE 2.0 directs DOL to update the 2002 safe harbor to provide that participants who first become eligible to participate (and beneficiaries who first become eligible for benefits) after December 31, 2025 must be furnished a one-time initial notice on paper in written form, prior to the electronic delivery of any pension benefit statement, of their right to request that all documents be furnished on paper in written form. DOL asks in the RFI what modifications or updates to the 2002 safe harbor are needed to implement Section 338 of SECURE 2.0, including whether any additional information should be included in, or other standards should apply to, the one-time initial paper notice. DOL further asks whether the initial paper notice should resemble the initial paper notice required under the 2020 safe harbor.

The 2002 safe harbor has worked well and been relied upon by both plan administrators and participants for more than 20 years. It already includes important and effective safeguards aimed at ensuring a participant's actual receipt of electronically delivered documents, and it requires plans to honor a participant's preference for paper delivery. The Council therefore recommends that DOL simply modify the 2002 safe harbor only to the extent necessary to implement Section 338's new requirement for a one-time initial paper notice for participants who first become eligible to participate (and beneficiaries who first become eligible for benefits) after December 31, 2025.[5] Limiting DOL's modifications to the 2002 safe harbor in this way would also be more consistent with Section 338, which indicates that Congress only sought to add a one-time initial paper notice to the safe harbor's existing requirements for these newly eligible participants and beneficiaries. This is evident in Section 338(b)(2), which expressly excludes the 2002 safe harbor regulation from the direction that Congress otherwise gave DOL to update its existing electronic delivery guidance. Further, there is no evidence that placing additional requirements or conditions on plan administrators using the 2002 safe harbor are needed, and doing so would only serve to increase costs for plans and, ultimately, for plan participants.

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[5] In updating the 2002 safe harbor to add the one-time initial paper notice in accordance with Section 338 of SECURE 2.0, we ask that DOL make it clear that the new notice does not apply to participants who first become eligible to participate (and beneficiaries who first become eligible for benefits) before January 1, 2026.

To implement Section 338, we recommend that the one-time initial paper notice be subject to the following requirements, which are consistent with the relevant aspects of the initial paper notice that is required in connection with the 2020 safe harbor: (1) the notice must include notification of the participant's (or beneficiary's) right to request that all documents be furnished on paper in written form; (2) the notice must include an explanation of how to exercise that right, and (3) the notice must be required to be written in a manner calculated to be understood by the average plan participant.

We also recommend that DOL confirm that the one-time initial paper notice only applies with respect to benefit statements and is not a prerequisite for furnishing other disclosures electronically under the 2002 safe harbor, including disclosures for health and welfare plans. Providing this confirmation would be consistent with Section 338, which requires furnishing the initial paper notice "prior to the electronic delivery of any pension benefit statement" and does not suggest in any manner that the notice is also required before furnishing other ERISA disclosures electronically under the 2002 safe harbor (e.g., summary plan descriptions or defined contribution plan fee disclosures). In addition, due to the similarities between the initial paper notice required under the 2020 safe harbor and the new initial paper notice that will be required under the 2002 safe harbor, we ask DOL to clarify that a plan administrator is only required to furnish an initial paper notice in accordance with the safe harbor upon which it initially relied with respect to a participant (i.e., either the 2002 or 2020 safe harbor) and is not required to deliver a subsequent paper notice in the event that the plan administrator later changes the electronic delivery safe harbor upon which it relies.

2020 Safe Harbor (RFI Question #20)

Section 338 of SECURE 2.0 directs DOL to update its 2020 safe harbor as necessary to ensure that (1) participants and beneficiaries are permitted the opportunity to request that any disclosure required to be delivered on paper under such guidance shall be furnished electronically; (2) each paper statement furnished pursuant to such updated guidance includes an explanation of how to request that all such statements, and any other documents required to be disclosed under ERISA, be furnished electronically and contact information for the plan sponsor, including a telephone number; (3) the plan may not charge any fee to a participant or beneficiary for delivery of any paper statements; (4) each required document that is furnished electronically by such plan shall include an explanation of how to request that all such documents be furnished on paper in written form; and (5) a plan is permitted to furnish a duplicate electronic statement in any case when the plan furnishes a paper pension benefit statement.

DOL asks in the RFI what modifications or updates to the 2020 safe harbor are needed to implement Section 338 of SECURE 2.0. The Council recommends that the 2020 safe harbor only be modified to the extent necessary to implement Section 338. We anticipate that few, if any, modifications to the 2020 safe harbor will be required in this

regard, as Section 338(b)(2) of SECURE 2.0 outlines a series of requirements that are already included under the 2020 safe harbor or represent existing practice.

DOL also asks to what extent pension benefit statements should contain the content of the initial paper notification required under the 2020 safe harbor. The Council strongly recommends that DOL refrain from increasing the substantive content of the benefit statements in this manner. Section 338 in no way suggests that Congress intended for any changes to be made to the content of benefit statements in connection with the introduction of a new paper delivery requirement. Adding extra content to benefit statements—and particularly content unrelated to describing a participant's benefits—will only serve to lessen the likelihood that a participant reads and comprehends the information the statement contains.

ELIMINATING UNNECESSARY PLAN REQUIREMENTS RELATED TO UNENROLLED PARTICIPANTS

Very generally, Section 320 of SECURE 2.0 exempts defined contribution plans from furnishing disclosures and notices that are otherwise required to be furnished to "unenrolled participants" if certain conditions are satisfied.

Definition of "Unenrolled Participant" (RFI Question 15)

SECURE 2.0 generally defines an unenrolled participant as an employee who: (a) is eligible to participate in the plan; (b) is not participating in the plan; (c) has been furnished the summary plan description and any other notices related to eligibility under the plan that are required to be furnished under ERISA or the Internal Revenue Code in connection with his or her initial eligibility under the plan; and (d) satisfies such other criteria the Secretary of Labor may determine appropriate in consultation with the Secretary of the Treasury.

DOL asks in the RFI whether there are additional criteria that DOL, in consultation with the Treasury Department, should consider for determining who is an unenrolled participant. For plans that choose to use the exemption for unenrolled participants, Section 320 of SECURE 2.0 provides for an important touch point in the form of an annual reminder notice, which may encourage eligible employees who are not yet participating in the plan to begin saving for retirement. In this regard, we support a broad definition of "unenrolled participant" that does not limit the group of employees who may be treated as such beyond what is already specified in the statute's broad approach.

Content of Annual Reminder Notice (RFI Question 16)

One of the conditions that Section 320 imposes on a defined contribution plan's ability to rely on the new exemption is that the plan must furnish an annual reminder

notice of the unenrolled participant's eligibility to participate in the plan and any applicable election deadlines. The annual reminder notice must also notify unenrolled participants of the "key benefits and rights under the plan, with a focus on employer contributions and vesting provisions."

DOL asks in the RFI whether there is additional information that DOL, in consultation with the Treasury, should consider for inclusion on the annual reminder notice. As noted in our response to Question 15, some of our members have indicated they view the annual reminder notice as an important touch point to encourage individuals to enroll in their workplace plan. For this reason, we recommend that any requirements with respect to the content of the annual reminder notice permit, but not require, the inclusion of additional text designed to further encourage plan participation and saving for retirement. If additional requirements are added, that just makes the reminder longer, less likely to be read, and less impactful, exactly the opposite of our objectives.

Model Annual Reminder Notice (RFI Question 17)

DOL asks in the RFI whether plan administrators would benefit from a model notice or model language for inclusion in the annual reminder notice required to be furnished to unenrolled participants. Some of the Council's members have indicated that it would be helpful if DOL would provide a sample annual reminder notice that plans may reference to help understand the requirements of such notice.

Other Guidance (RFI Question 14)

DOL asks whether there is any other guidance that plan administrators would find helpful to implement Section 320 of SECURE 2.0. As added by Section 320, new ERISA Section 111(c)(1) requires the annual reminder notice to be furnished "in connection with the annual open season election period with respect to the plan or, if there is no such period, is furnished within a *reasonable period prior to the beginning of each plan year*." [Emphasis added.] Council members have indicated that it would be helpful for DOL to provide guidance on the meaning of "reasonable period prior to the beginning of each plan year." To be consistent with other annual notices, we recommend that guidance provide that Section 111(c)(1) of ERISA is satisfied if, in cases where there is no annual open season election period, the annual reminder notice is furnished up to 90 days before the next plan year.

EMERGENCY SAVINGS ACCOUNTS LINKED TO INDIVIDUAL ACCOUNT PLANS

Section 127 of SECURE 2.0 allows a 401(k), 403(b), or governmental 457(b) defined contribution plan to include a pension-linked emergency savings account ("PLESA") as a short-term savings account.

Guidance Needed on PLESAs (RFI Question 7)

DOL asks in the RFI what guidance, if any, do plan administrators need to effectively implement the requirements of PLESAs under Section 127 of SECURE 2.0. In a letter dated August 4, 2023, the Council submitted comments to DOL describing several aspects of PLESAs on which guidance is needed. For convenience, we repeat those requests from our August 4th letter below:

- **$2,500 Limit:** Under the statute, no contribution to a PLESA may be accepted to the extent that such contribution would cause the portion of the account balance attributable to participant contributions to exceed the lesser of $2,500 or a lower amount set by the plan sponsor. The question has been raised regarding whether "the portion of the account balance attributable to participant contributions" includes earnings. The answer has to be no, because if earnings were included, there would be no reason to refer to "the portion of the account balance"; if earning were included, that would mean that the entire account balance would be taken into account. Please confirm that earnings are not taken into account in applying the $2,500 (or lower) limit on a PLESA.

- **Withdrawals:** Under the statute, withdrawals are permitted at the discretion of the participant, subject to certain timing restrictions. There is no requirement for the participant to demonstrate or certify the existence of an emergency or other need. Please confirm that, in order to make a withdrawal, there is no need for a participant to demonstrate or certify the existence of an emergency or other need.

- **Cost to Participants:** The statute does not specify which participants may be charged for the cost of maintaining the PLESA. Please confirm that the employer has discretion to charge the cost of the PLESA in any reasonable manner to all participants in the plan or only to participants in the PLESA.

- **Lifetime Income Disclosure Rules:** The statute does not address the issue of whether the lifetime income disclosure rules of ERISA Section 105(a)(2)(D) apply to PLESAs. Please confirm that the lifetime income disclosure rules do not apply to PLESAs, which are generally intended to be emergency savings and not to provide retirement income.

- **Participation in PLESA When Not Eligible for Retirement Part of Plan:** The statute defines an eligible participant as an individual who meets any age, service, or other eligibility requirements of the plan. In our view, the statute does not preclude allowing individuals to participate in the PLESA even if they are not eligible to participate in the retirement part of the plan, such as individuals who have not met the plan's general service requirement. Please confirm that the statute does not preclude allowing individuals to participate in the PLESA even

if they are not eligible to participate in the retirement part of the plan, such as individuals who have not met the plan's general service requirement.

- **Investments:** The statute imposes certain requirements on how a PLESA may be invested, such as in an investment product designed to preserve principal. We are aware of no reason why money market funds or stable value funds could not be offered as investments. Please confirm that money market funds or stable value funds may be offered as PLESA investments. Please also address whether the PLESA investment option may be limited to the PLESA and not made available as a designated investment alternative under the plan. Further, how does the PLESA investment need to be reflected on the participant investment disclosures under 29 CFR 2550.404a-5?

- **Reasonable Procedures to Prevent Manipulation:** The statute permits employers to employ reasonable procedures to prevent manipulation of the rules with respect to matching contributions to the non-PLESA account under the plan. It is not clear (1) what employers are permitted to do, or (2) if there is anything employers must do to prevent employees from making PLESA contributions solely to get a matching contribution. We recommend that the agencies not issue any guidance regarding possible manipulation with respect to matching contributions. It is possible under current law for employees to make contributions to a retirement account solely to get a matching contribution and then take the money out immediately without the 10% early distribution tax (such as in the case of employees who have attained age 59½). That practice has not been an issue, so there is no reason to assume that this will be a problem in the case of PLESAs. Accordingly, we recommend waiting to see if this problem emerges in practice before issuing any guidance on it.[6]

- **Minimum Standards:** The statute authorizes DOL to issue regulations establishing minimum standards for PLESAs in order to get ERISA preemption. We ask that DOL make it clear that it will not issue any required minimum standards in order for ERISA preemption to apply, at least until a compelling case is made for such minimum standards based on data collected over several years. Otherwise, the threat of the loss of preemption could chill the market for the establishment of PLESAs.

- **Fees or Charges for Withdrawals:** One of the requirements of offering a PLESA is that, with respect to at least the first four withdrawals from the account in a plan year, there can be no fees or charges "solely on the basis" of such a withdrawal. Any subsequent withdrawals, however, may be subject to "reasonable fees or charges in connection with such a withdrawal, including

[6] In this regard, we interpret the limit on matches to be $2,500.

reasonable reimbursement fees imposed for the incidental costs of handling of paper checks." The statute implies that fees *may* be charged on the first four withdrawals from a PLESA in a plan year provided that such fees are not charged "solely on the basis" of the withdrawal. It is not clear, however, what types of fees or charges are contemplated as being permitted in this regard. For example, if a recordkeeper ordinarily charges a check writing fee on any and all distributions from the plan, may that check writing fee be charged on the first four PLESA withdrawals in a plan year, so long as the fee is applied to withdrawals broadly and not solely with respect to withdrawals from PLESAs? Please issue guidance on what it means for a fee or charge to be assessed on a PLESA withdrawal in a manner that is not considered to be made "solely on the basis" of such withdrawal.

- **Highly Compensated Employees:**
    - Please issue guidance on the exclusion of HCEs. Some plans don't identify HCEs for nondiscrimination purposes until testing is underway, which typically happens after the plan year to which the HCE determination relates. However, it appears that plans offering PLESAs will need to identify HCEs at the beginning of the year to enforce this restriction, unless DOL and IRS provide more flexibility.
    - Please issue guidance on corrections for the inadvertent inclusion of HCEs.
- **Coordination of PLESA Contribution Limit with Annual Deferral Limit:** Please address whether all PLESA contributions count toward the annual deferral limit, or whether only contributions up to the applicable PLESA contribution limit (in the event of offsetting withdrawals) count toward the limit. For simplicity, we request that plan sponsors have the option of electing to apply the PLESA contribution limit as an annual contribution limit.
- **Prohibition on Minimum Contributions:** Please address how the prohibition on minimum contributions applies. May plans still require participant contributions to be in percentage increments, or must they allow small dollar contributions?
- **Restarting PLESA Contributions After a Withdrawal:** Please address when plan sponsors must restart PLESA contributions after participants who reached the account limit take a withdrawal. May plan sponsors wait until the beginning of the next plan year?
- **Distribution Reporting:** Will PLESA distributions need to be reported on 1099-R?

- **Interaction with Plan's Existing Automatic Enrollment Arrangement:** How does PLESA automatic enrollment interact with a plan's existing automatic enrollment arrangement? May a plan sponsor count the up-to-3% PLESA contribution toward the plan's automatic enrollment rate, or are they separate contribution rates? How do permissible withdrawals under an EACA work if the participant's initial contributions are all going to the PLESA?

Model Notice or Model Language (RFI Question 8)

DOL asks in the RFI whether administrators of plans that include PLESAs would benefit from a model notice or model language for inclusion in the required notice. Some of the Council's members have indicated that model plan notices and model language would be helpful, pursuant to Section 127(f)(3) of SECURE 2.0.

DEFINED CONTRIBUTION PLAN FEE DISCLOSURE IMPROVEMENTS

Section 340 of SECURE 2.0 directs DOL to review the 404a-5 fee disclosure regulations and explore how the content and design of the 404a-5 disclosures may be improved to enhance participants' understanding of fees and expenses.

Disclosure Content and Requirements (RFI Questions #11-12)

DOL asks in general about the adequacy or inadequacy of the information regarding plan fees and expenses that is currently being provided to participants, whether in the 404a-5 disclosure or elsewhere. DOL further inquires about whether additional or different content in the 404a-5 disclosure could enhance participants' understanding of costs, and whether different design, formatting, or similar aspects could improve the disclosures' effectiveness.

It is the Council's experience that participants are overwhelmed by the sheer volume and number of disclosures they receive regarding their retirement plan, let alone all of the additional disclosures they must sort through in connection with any number of health and other forms of employee benefits. In short, there are far too many disclosures, and many of them are far too long. We have found that the most effective means of addressing these challenges is by providing documents electronically with the use of links and similar other tools to improve organization and understanding, and to allow participants to easily access more detailed information if and when desired. We encourage DOL to keep these best practices in mind when fulfilling its requirements under Section 340 of SECURE 2.0, and to avoid worsening the disclosure and information overload already experienced by participants.

CONSOLIDATION OF DEFINED CONTRIBUTION PLAN NOTICES

Section 341 of SECURE 2.0 directs DOL and the U.S. Treasury Department to adopt regulations providing that a plan may, but is not required to, consolidate some or all of the following notices into one notice: (1) the qualified default investment alternative (QDIA) notice; (2) the safe harbor notice; (3) the automatic enrollment safe harbor notice; and (4) the permissive withdrawal notice.

Benefits and Drawbacks to Consolidating Notices (RFI Question #22)

DOL asks about the benefits and drawbacks to both plans and participants in consolidating notices as provided for in Section 341 of SECURE 2.0. As we noted above with respect to DOL's review of the 404a-5 fee disclosure regulations, our experience is that participants are overwhelmed by the sheer volume and number of plan-related disclosures they receive. The most effective way our members have found to increase participants' review and understanding of this information is through electronic delivery means, particularly when the information is presented in a manner that makes use of links and other formatting tools to increase user engagement. In this regard, the option for plan administrators to consolidate multiple notices into a single notice can be very helpful in reducing the number of plan disclosures a participant receives in a manner that does not compromise the level of participant review or understanding thanks to advancements in technology and understanding how to more effectively present lengthy and complex information. We believe that Congress struck the appropriate balance in Section 341 of SECURE 2.0 by instructing DOL and Treasury to issue regulations permitting, but not requiring, plan administrators to consolidate certain notices, and we look forward to the agencies' implementation of this helpful provision.

INFORMATION NEEDED FOR FINANCIAL OPTIONS RISK MANAGEMENT

Section 342 of SECURE 2.0 amends ERISA to enhance the existing disclosure requirements with respect to lump sum windows by requiring defined benefit plan administrators to provide participants and beneficiaries with advance notice of an opportunity to elect to receive a lump sum. Section 342 specifies the information that must be included in the advance notice, including general tax rules related to accepting a lump sum, including rollover options and early distribution penalties. SECURE 2.0 requires DOL, in consultation with the Treasury Department, to issue regulations implementing this provision.

Disclosure Requirements (RFI Questions #23-27)

DOL asks a series of questions regarding the content of the lump sum window advance notice, including whether DOL should factor in any existing mandatory notices or disclosures under the Internal Revenue Code when developing regulations to implement Section 342 of SECURE 2.0. The Council notes that most of the issues contemplated by Section 342 are already addressed in Treasury guidance. We therefore strongly emphasize the importance of following SECURE 2.0's direction that DOL must consult with the Treasury Department in issuing regulations to implement Section 342. We ask that DOL not issue any guidance on Section 342 without first consulting and coordinating with the Treasury Department. It is critical to avoid overlapping but different rules coming from two different agencies. That would result in unnecessary costs to plans and confusion for participants. Since most of the issues covered by Section 342 are already addressed by Treasury guidance, there is far less urgency for guidance on this section than for other sections of SECURE 2.0.

POOLED EMPLOYER PLANS

Section 105 of SECURE 2.0 clarifies that any named fiduciary (other than an employer in a pooled employer plan (PEP)) may be designated as having responsibility for the collection of contributions to the plan and for implementing written contribution collection procedures. This clarification enables directed trustees to serve as trustees of PEPs. Section 344 of SECURE 2.0 requires DOL to periodically submit a report to Congress and make publicly available DOL's findings from a study of the PEP industry. The report is required to include legislative recommendations on how PEPs can be improved to serve and protect participants.

Clarification Regarding PEP Trustees (RFI Question #1)

DOL asks what guidance, if any, for purposes of reporting on Form PR or otherwise, do pooled plan providers, fiduciaries, trustees, or other parties need to implement Section 105 of SECURE 2.0. Apart from updating the Form PR and Instructions, the Council believes that additional guidance on Section 105 is neither necessary nor desired because the statute is very clear and straightforward.

DOL Study of PEP Industry (RFI Questions #2-6)

DOL asks a series of questions regarding the PEP industry study required under Section 344 of SECURE 2.0, including questions regarding the range of investment options provided in PEPs, the marketing of PEPs to employers, how employers select and monitor PEPs, and participant disclosures. As DOL begins to consider its approach to the study and report required under Section 344, the Council would like to emphasize that PEPs are doing very well, particularly as a new type of plan that is still

evolving and growing in the marketplace. Given the potential for PEPs to meaningfully increase retirement plan coverage and decrease costs—a potential that the new PEP industry is already demonstrating—we urge DOL not to introduce more burdens on PEPs or the employers that join PEPs unless there is convincing evidence that such action is necessary.

PERFORMANCE BENCHMARKS FOR ASSET ALLOCATION FUNDS

Section 318 of SECURE 2.0 directs DOL to issue regulations under Section 404 of ERISA providing that, in the case of a designated investment alternative that contains a mix of asset classes, a plan administrator may, but is not required to, use a benchmark that is a blend of different broad-based securities market indices if certain criteria are satisfied.

Criteria for Use of Blended Benchmarks (RFI Question # 9)

DOL asks in the RFI whether there are additional factors beyond the criteria specified in Section 318 of SECURE 2.0 that would be helpful to plan administrators and participants. In the Council's opinion, Congress already incorporated the appropriate criteria into Section 318 to ensure that plan administrators and participants can effectively use and understand blended benchmarks. We therefore recommend that DOL not add any additional factors when updating its regulations to reflect Section 318.

DEFINED BENEFIT ANNUAL FUNDING NOTICES

Section 343 of SECURE 2.0 streamlines the information required to be included in the annual funding notice (AFN) that administrators of defined benefit (DB) plans required to be insured by the Pension Benefit Guaranty Corporation (PBGC) must provide to the PBGC, participants, and beneficiaries (among other recipients) for each plan year.

Guidance on Amended Content Requirements (RFI Question #29)

DOL asks in the RFI whether there is a need for guidance with respect to any of the amended content requirements in Section 101(f)(2)(B) of ERISA. In its August 4 letter to DOL, the Council submitted comments describing one aspect of the amended content requirements on which guidance is needed. For convenience, we repeat that comment from our August 4th letter here.

The requirement under Section 343 of SECURE 2.0 to provide participant counts as of the end of the plan year, rather than the beginning of the plan year, could be challenging for many plan sponsors. This is because the data editing and reconciliation process can require several months, especially for large, complex plans. Under current

law, the AFN requires a measurement of assets and liabilities as of the end of the plan year, which is relatively straightforward to prepare. However, the participant count is as of the valuation date, which is required to be the first day of the plan year for plans other than small plans. For example, an AFN for the 2022 plan year sent to participants in early 2023 included information on assets and liabilities as of December 31, 2022, but participant counts as of January 1, 2022 (which would generally have been reported already on the Form 5500 for the 2021 plan year filed by October 15, 2022). When the changes made by Section 343 become applicable, a plan sponsor might be able to provide estimated participant counts by the time the AFN needs to be prepared and distributed, but the final counts could likely end up being different. Therefore, with respect to the new requirement to use end-of-year participant counts, it would be helpful to have guidance allowing the use of beginning-of-year counts as an alternative to end-of-year counts or explicitly acknowledging that the use of estimates is acceptable.

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Thank you for your consideration of the Council's responses to the RFI. Should you have any questions on our comments or if we can be of any assistance, please contact me at ldudley@abcstaff.org.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy