INSURED RETIREMENT INSTITUTE

October 10, 2023

VIA ELECTRONIC SUBMISSION

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution, Ave, NW
Washington, DC 20210
Attn: Request for Information—SECURE 2.0 Reporting and Disclosure.

Re: Request for Information—SECURE 2.0 Reporting and Disclosure
RIN 1210–AC23

To Whom It May Concern:

On behalf of our members, the Insured Retirement Institute ("IRI")[1] appreciates the opportunity to provide these comments to the Department of Labor (the "Department") in response to its *Request for Information on SECURE 2.0 Reporting and Disclosure* (the "RFI")[2]. The RFI was issued to solicit public feedback and to begin developing a public record for a number of provisions of the *SECURE 2.0 Act of 2022* ("SECURE 2.0")[3] that impact the reporting and disclosure framework of the Employee Retirement Income Security Act of 1974 (ERISA).[4]

IRI strongly supported and actively pursued the enactment of SECURE 2.0 and its predecessor, the Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act").[5] Building upon the reforms made by the SECURE Act, SECURE 2.0 will provide more opportunities and choices for Americans to save for their retirement years by expanding access to and use of workplace retirement plans, enabling more people to obtain guaranteed lifetime income products, and helping to ensure that retirees do not outlive their retirement savings.

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[1] The Insured Retirement Institute (IRI) is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, broker-dealers, banks, marketing organizations, law firms, and solution providers. IRI members account for 90 percent of annuity assets in the U.S., include the foremost distributors of protected lifetime income solutions, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community.

[2] 88 FR 54511 (Aug. 11, 2023).

[3] The Consolidated Appropriations Act, 2023, H.R. 2617, Division T (Dec. 29, 2022).

[4] Employee Retirement Income Security Act of 1974, Title I – Protection of Employee Benefit Rights, Subtitle B – Regulatory Provisions, Part 1 – Reporting and Disclosure, As Amended Through P.L. 117-328, Enacted December 29, 2022.

[5] Pub.L. No. 116–94 (2019).

We commend the Department for undertaking the effort to collect public feedback on the topics covered in the RFI before initiating any formal rulemaking. We believe this preliminary step will put the Department in a position to ultimately conduct more efficient and effective rulemaking, and to produce final regulations that are workable for the industry and appropriately protect the interests of retirement plans, sponsors, participants, and beneficiaries.[6]

Before turning to the questions presented in the RFI, we want to highlight and emphasize two key points. First, we strongly support the consolidation and streamlining of notices and disclosures that are required under ERISA. These documents can and should be presented in a clear and concise manner that is simple for consumers to read and understand, much like the summary plan description (SPD). Disclosures that are duplicative, inconsistent, or spread out across multiple documents make it much harder for average consumers to comprehend the information being provided.

Second, we strongly support the use of electronic means as the default mechanism for delivery of such notices and disclosures (e-delivery). To be clear, we continue to believe that individual consumers should have the option to request paper delivery, but in the modern world, paper should be the exception, not the rule. Generally speaking, however, we believe the Department (and, for that matter, all other regulators with jurisdiction over the financial services industry) should seek to leverage the capabilities of modern technology to enhance and improve the consumer experience. The vast majority of Americans now have ready access to the Internet, and the use of technology has become so deeply ingrained in our everyday lives that most consumers now want and expect an Amazon-like experience when interacting with their financial institutions.

In the context of ERISA plans, this would include taking steps to facilitate the use of e-delivery for all required notices and disclosures. E-delivery is safer and more effective than traditional paper delivery, with features such as audit trails and multi-factor authentication providing greater consumer protections than paper. Using e-delivery to communicate with consumers also creates opportunities for the industry to provide dynamic, real-time information rather than static data, and to make it easier for consumers to navigate though that information to find the details that are most important to them through the use of layered disclosure. E-delivery also facilitates greater accessibility, as notices and disclosures that are delivered electronically can, for example, be translated into a consumer's preferred language, converted into an audio format for those with vision impairments, or presented in a larger font size for those who struggle reading smaller text. The enhanced consumer protections and flexibility made possible by e-delivery simply cannot be matched in the non-digital world.

[6] We note that the RFI does not purport to address Section 319 of SECURE 2.0, which directs the Department, along with the Department of the Treasury and the Pension Benefit Guaranty Corporation, to review and deliver a report to Congress on the effectiveness of each agency's existing reporting and disclosure requirements for retirement plans, along with recommendations to consolidate, simplify, standardize, and improve such requirements. As noted in the RFI, the review contemplated by Section 319 will be "expansive in scope and calls for more generalized questions about how to best communicate information" in a wide range of circumstances. IRI understands that the Department intends to undertake a separate effort to formally solicit public input on the Section 319 project, and we look forward to the opportunity to share our members' perspectives as to how the overall reporting and disclosure regime can be improved.

In furtherance of the critically important objectives and key points referenced above, IRI and our members respectfully offer the comments set forth below in response to the questions presented in the RFI:

A. Pooled Employer Plans (PEPs)

Implementation of the Revised Definition of "Pooled Employer Plan"

As amended by Section 105 of SECURE 2.0, ERISA Section 3(43)(B)(ii) now requires that the terms of a "pooled employer plan" ("PEP") include the designation of "a named fiduciary (other than an employer in the plan) to be responsible for collecting contributions to the plan and require such fiduciary to implement written contribution collection procedures that are reasonable, diligent, and systematic[.]"

The RFI notes that the Department will be modifying Form PR to reflect this provision. In doing so, IRI recommends that the Department include a requirement that the Form include contact information for the named fiduciary designated to collect and monitor contributions. Doing so would enable the Department, the plan trustee, and other interested parties to easily identify and contact the appropriate person with any questions or concerns related to the collection and monitoring of PEP contributions.

IRI also recommends that the Department develop model language to describe the written contribution procedures now required to be established by the named fiduciary. Such model language would help facilitate a common approach or standard for the industry.

In addition, IRI recommends that the Department provide guidance to clarify that the plan trustee is not responsible for collecting and monitoring contributions to a PEP given that the named fiduciary designated in the plan would be responsible for performing these functions.

Study and Report on PEPs

Section 344 of SECURE 2.0 requires the Department to conduct a study on the PEP industry within five years after enactment and every five years thereafter, and to produce a report on its findings for delivery to Congress and posting on its public website. These studies are required to address, among other things, the range of investment options provided in PEPs, the fees assessed in PEPs, the manner in which employers select and monitor PEPs, the disclosures provided to PEP participants, and the extent to which PEPs have increased retirement savings coverage in the United States. The reports are required to include recommendations to improve PEPs to better serve and protect participants.

IRI believes Form PR and Form 5500 should be the Department's primary data sources in connection with the studies required under this provision. Much of the information required to be considered as part of these studies can be gleaned from the disclosures provided on these forms. As necessary, the Department can supplement this data with information disclosed on public websites used to market PEPs or pooled plan providers ("PPPs"). If the Department determines in the future that different or additional data is needed, the Department should develop and issue a proposal for public comment to amend those forms as necessary. IRI would strongly discourage the development of any new disclosure or reporting mechanisms for this purpose.

With respect to the questions in the RFI related to specific elements required to be included in the Department's studies, we offer the following perspectives:

1. IRI agrees with the Department's interpretation, as described in question 3 in the RFI, that the wide range of investments potentially available through a brokerage window are out of scope and need not be addressed as part of these studies.
2. PEPs are generally marketed and purchased in much the same way as single employer plans, with an evaluation of how a PEP can meet the specific benefit and organizational goals of the employer. The one difference is additional choice structure (PEP vs maintaining a single employer plan). Most employers utilize the services of a financial advisor who assists the employer in evaluating the pros and cons of either approach, PEP or single employer plan, to better inform the employer's decision.
3. IRI does not believe there is a need for any new PEP-specific notices or disclosures. There is no reason to believe that participants would want or need different information based on whether they are in a PEP as compared to a single-employer plan. The disclosures currently required under ERISA should already provide PEP participants with the right information.
4. Data gathered from an analysis of Form 5500s should be sufficient for the Department to evaluate the extent to which PEPs have increased retirement savings coverage. Non-partisan groups such as the Employee Benefits Research Institute ("EBRI") might also be able to assist the Department in assessing the effectiveness of PEPs in closing the coverage gap.

B. Emergency Savings Accounts Linked to Individual Account Plans

To support the implementation of section 127 of SECURE 2.0 and new part 8 of ERISA, IRI recommends that the Department provide guidance as to (a) whether and how a pension-linked emergency savings accounts ("PLESA") can be used by a plan that already includes a QDIA, and (b) how the Department interprets the term "emergency" for purposes of Section 127 of SECURE 2.0 and new part 8 of ERISA. IRI also recommends that the Department develop model language for inclusion in the notice required under new Section 801 of ERISA.

C. Performance Benchmarks for Asset Allocation Funds

IRI generally believes that the factors specified in Section 318 of SECURE 2.0 are sufficient and appropriate to enable plan administrators to effectively select and monitor blended performance benchmarks for mixed asset class funds, and to ensure that participants and beneficiaries can effectively understand and use such benchmarks. We would, however, recommend that the Department preserve flexibility to allow for different benchmarks to be used in connection with different investment types. As an example, a benchmark designed for a target date fund ("TDF") with a 'to retirement' glidepath may not be as appropriate or meaningful in the context of a TDF that employs a 'through retirement' glidepath.

D. Defined Contribution Plan Fee Disclosure Improvements

Section 340 of SECURE 2.0 directs the Department to assess whether and how the content and design of the disclosures required under Section 2550.404a–5 of title 29, Code of Federal Regulations (relating to fiduciary requirements for disclosure in participant-directed individual account plans) ("404(a)(5) Disclosures") can be improved to help participants better understand the fees and expenses associated

with their plan and the cumulative effect those fees and expenses can have on their retirement savings over time.

IRI believes the 404(a)(5) Disclosures currently being provided to participants are generally thorough, accurate, transparent, and sufficient to inform participants about the various fees associated with their plan. We do not believe any changes are needed at this time. Rather, we are concerned that any effort to expand the content of the 404(a)(5) Disclosures would be counterproductive as it would increase the likelihood that participants will become overwhelmed and frustrated by the amount of information being provided.

That being said, we would recommend that the Department consider providing guidance or support as needed to help plan fiduciaries prepare their 404(a)(5) Disclosures in a manner that can be easily understood by the average investor. Such guidance could, for example, address ways to condense and streamline the content (i.e., by using layered disclosure to help participants more easily navigate through the information being provided), as well as ways to make the content more visually appealing and engaging (i.e., through the use of imagery and charts).

E. Eliminating Unnecessary Plan Requirements Related to Unenrolled Participants

Section 320 of SECURE 2.0 generally relieves plan administrators of the obligation to provide required disclosures, notices, and other plan documents to unenrolled participants other than an annual reminder of their eligibility to participate in the plan and any applicable election deadlines.

IRI recommends that the Department issue guidance to provide greater clarity as to which specific required disclosures, notices, and documents would not have to be delivered to unenrolled participants under this provision.

In our view, no additional information is needed on the annual reminder notice to unenrolled participants; however, we do recommend the Department consider guidance to clarify that this section also applies to participants in a plan that are currently not contributing and have a zero balance, without regard to whether they may have made contributions and had a balance in the past.

F. Requirement to Provide Paper Statements in Certain Cases

Under Section 338 of SECURE 2.0, for plan years beginning after December 31, 2025, at least one pension benefit statement must be furnished on paper in written form during every calendar year to participants in individual account plans[7] unless the plan furnishes such statements in accordance with the Department's 2002 electronic delivery safe harbor (the "2002 Safe Harbor")[8] or allows participants and beneficiaries to request that such statements be delivered electronically.

[7] We note that Section 338 also imposes paper statement delivery requirements in the context of defined benefit plans, which are outside of IRI's focus and expertise. As such, we believe other commentators are better positioned to respond to the Department's questions in that context. Our responses address only the individual account plan context.

[8] 29 CFR § 2520.104b–1(c).

In our view, the inclusion of this provision in SECURE 2.0 is unfortunate. Through the adoption of its final rule on *Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA*[9] in 2020 (the "2020 Safe Harbor"), the Department created a workable and appropriate path for plan administrators to use electronic media as the default mechanism for delivery of information to plan participants and beneficiaries. Importantly, the 2020 Safe Harbor provides appropriate and effective consumer protections, including the preservation of the right of individuals who might prefer to receive such information on paper to opt out of electronic delivery. IRI strongly supported the adoption of the 2020 Safe Harbor.

By all accounts, the 2020 Safe Harbor is working to achieve the Department's objectives. The Department's report to Congress in February 2022[10] confirmed and explained that, based on the extensive consumer protections embedded in the 2020 Safe Harbor, it is unlikely to have any negative impact on "individuals residing in rural and remote areas, seniors, and other populations that either lack access to web-based communications or who may only have access through public means."

Moreover, the White House Office of Management and Budget (OMB) recently published a fact sheet[11] on policy guidance to Federal agencies to transform the way the government communicates with Americans in an era where digital channels are now the primary source of communications and states that, "Digital is now the default way the public interacts with their government – and they expect their online experiences to be consistent with their favorite consumer websites and mobile apps", which includes their financial and retirement plan providers and their products and services.

With all this in mind, the requirements set forth in Section 338 of SECURE 2.0 are a significant step backwards. We are extremely concerned that the re-establishment of a paper delivery requirement will cause significant confusion and frustration for many participants and beneficiaries, particularly those who have been receiving documents through electronic delivery under the 2020 Safe Harbor. To minimize the likely adverse impact of this new requirement, IRI strongly recommends that the Department take an extremely narrow approach to implementation of Section 338. In developing a proposal to comply with the Congressional directive, the Department should go no further than is clearly and absolutely necessary.

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[9] 29 CFR § 2520.104b-31 - Alternative method for disclosure through electronic media—Notice-and-access. The 2020 Safe Harbor was developed in response to Executive Order 13847 ("EO 13847"), which directed federal agencies to "…revise or eliminate rules and regulations that impose unnecessary costs and burdens on businesses, especially small businesses, and that hinder formation of workplace retirement plans." As explained in EO 13847, "…reducing the number and complexity of employee benefit plan notices and disclosures currently required would ease regulatory burdens. The costs and potential liabilities for employers and plan fiduciaries of complying with existing disclosure requirements may discourage plan formation or maintenance. Improving the effectiveness of required notices and disclosures and reducing their cost to employers promote retirement security by expanding access to workplace retirement plans."

[10] "Report on Default Electronic Disclosure by Employee Pension Benefit Plans Under Employee Retirement Income Security Act" available at https://www.asppa-net.org/sites/asppa.org/files/EBSA%20--%20Default%20Electronic%20Disclosure%20Report%20%281.26.2022%29-3.pdf.

[11] The Office of Management and Budget, FACT SHEET: Building Digital Experiences for the American People, September 22, 2023, available at https://www.whitehouse.gov/omb/briefing-room/2023/09/22/fact-sheet-building-digital-experiences-for-the-american-people/.

In particular, IRI would strongly oppose any changes that would require access-in-fact or verification that participants have received, opened, read, and understood disclosures delivered in accordance with either the 2002 Safe Harbor or the 2020 Safe Harbor. No such requirements exist under any other existing regulatory regime, and for good reasons, the Department specifically rejected such requirements when it adopted the 2020 Safe Harbor.[12] We urge the Department to follow the same path now, and to uphold the existing framework for the 2020 Safe Harbor to the greatest degree possible.

G. Consolidation of Defined Contribution Plan Notices

Section 341 of SECURE 2.0 requires the Department, together with the Department of the Treasury, to issue regulations allowing for the consolidation of two or more of the notices required under certain specified sections of ERISA and the Internal Revenue Code. IRI is generally supportive of such consolidation as long as it is executed in such a way that is not confusing to the participant.

While we appreciate the Department's interest in identifying perceived impediments, benefits, and drawbacks of consolidation, we believe the Department should instead focus on the spirit and intent of this provision, which is to improve the efficiency and effectiveness of certain required notices by combining key plan and investment information into a single document.

To that end, IRI recommends that the regulations required to be issued by the Department under this provision include clear guidance as to which notices can be consolidated, and whether the individual notices that have been combined into a consolidated notice must be specifically identified. In addition, the Department should specifically allow for consolidated notices to be delivered to participants on an annual basis based on either the calendar year or the plan year. We also believe it would be appropriate and beneficial for the Department to develop model language to be used in consolidated notices.

H. Information Needed for Financial Options Risk Mitigation

Under Section 342 of SECURE 2.0, if a plan has been amended to provide a time-limited opportunity to elect a lump sum distribution rather than annuity payments for life, the plan administrator is required to provide participants and beneficiaries with advance notice of such opportunity. The Department must adopt implementing regulations and a model disclosure form that reflect the specific content requirements set forth in this provision.

IRI believes most plan providers already meet the majority of the content requirements when providing participants with lump sum window elections. We note, however, that the disclosure is required to include information about available benefit options, including whether the plan offers a subsidized early retirement option or a fully subsidized qualified joint and survivor annuity (QJSA). Some participants and

[12] *See* 85 FR 31884, at 31900 ("[I]mposition 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…[T]he Department believes that the rule's protections for covered individuals, not only paragraph (f)(4) but, for example, the clear and timely communication of website activity and paper and opt-out rights to preserve individuals' delivery preferences, taken together, provide a method of furnishing documents that is more than reasonably calculated to ensure actual receipt of covered documents. Thus, the Department does not see a compelling reason to establish a stricter standard for monitoring covered individuals' use of disclosures furnished electronically than for paper deliveries.")

beneficiaries may not be familiar with or readily understand these terms, and therefore, IRI recommends that the Department incorporate simplified explanations of these concepts using plain English language that the average participant will understand. In developing its implementing regulations and the model disclosure form, the Department should account for the existing QJSA disclosure requirements set forth in Section 1.417(a)(3) of the Internal Revenue Code.

IRI believes the model disclosure form will be most effective if it provides general information about the available benefit options, together with a reasonable estimate of the amounts that would be paid under the different options as well as a description of the relative value of each option for the plan and participant. Additionally, the Department should consider using existing reporting on Form 8955-SSA, including the participant's date of birth and whether a lump sum window was offered or taken, rather than creating additional reporting for the pre- and post-election window reporting framework.

I. Defined Benefit Annual Funding Notices

IRI has no comments on the questions related to defined benefit annual funding notices, as defined benefit plans are outside of IRI's focus and expertise. We believe other commentators are better positioned to respond to the Department's questions in that context.

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Thank you again for the opportunity to provide these comments. If you have questions about any of our comments on the RFI, or if we can be of any further assistance in connection with this important regulatory effort, please feel free to contact either of the undersigned at jberkowitz@irionline.org or rplowman@irionline.org.

Sincerely,

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