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Invested in America

October 10, 2023

VIA ELECTRONIC SUBMISSION
Office of Regulations and Interpretations
Employee Benefit Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: RIN 1210-AC23

RFI – SECURE 2.0 Reporting and Disclosure

Dear Assistant Secretary Gomez:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to submit this letter to the Department of Labor in response to their Request for Information with regard to some of the provisions of Division T of the Consolidated Appropriation Act, 2023, referred to as SECURE 2.0.[2]

I. Pooled Employer Plans (Question 1-6)

Section 344 of SECURE 2.0 requires the Department to study pooled employer plans ("PEPs"), including the number of PEPs, the number of participants, fees, disclosure, and enforcement actions, along with making recommendations for improvement. That report is to be published within 5 years of enactment. The study is also to examine the impact of these plans on retirement savings coverage.

[1] SIFMA is the leading trade association for BDs, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly one million employees, we advocate on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (the "GFMA").

[2] 88 Fed. Reg. 54511 (August 11, 2023)

For question 1, the Department 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 the revised definition in ERISA section 3(43)(B)(ii) effectively. We believe that the disclosures and reporting only needs the additional designation of a named fiduciary who is responsible for collecting contributions to the plan to be added. Such a change should not require any additional regulatory guidance to effectuate.

In question 2, the Department asks about other data sources the Department could use to collect data on the topics enumerated in Section 344 of SECURE 2.0. We believe the Form 5500 Annual Report, the Form PR and required disclosures for PEPs under ERISA 103(g) should provide the Department all the necessary data it needs to conduct the study.

In question 3, the Department takes the phrase requiring identification of "the range of investment options provided in such plans" and expands it to cover all the specific investment options. We question the necessity of the Department needing to see all the investment options available for PEPs. Since the statutory language only asks for the "range of investment options," we believe that can be well captured by ensuring appropriate diversity of investment option categories.

In question 6, the Department asks about how they could determine whether PEPs have helped increase retirement savings coverage. We would suggest the Department review the contributions made to PEPs in the Schedule MEP.

II. Performance Benchmarks for Asset Allocation Funds (Questions 9-10)

Section 318 of SECURE 2.0 requires the Department to modify existing regulations to provide that, in the case of a designated investment alternative which contains a mix of asset classes, a plan administrator may use a benchmark which is a blend of different broad-based securities market indices. The Department has three years to submit a report on this issue.

The blend must first be reasonably representative of the asset class holding. If needed, the blend must be modified at least once a year, to determine the return for 1, 5, and 20 year periods. The average plan participant must also be able to understand how the blend is calculated.

The Department asks stakeholders to review their previous guidance released in 2012 regarding the standards for use of a "reasonable" blended performance benchmark.[3] In that guidance, the Department notes that "the plan administrator may use the target asset allocation of the designated investment alternative to determine the weightings of the indexes used in creating the additional benchmark if it is representative of the actual holdings of the designated investment alternative over a reasonable period of time.

Further, the Department notes: Whether a time period is "reasonable" under this standard is dependent on the facts and circumstances; however, in the Department's view, a period that is the same as covered by the benchmark returns (*e.g.*, 1-, 5-, or 10-year period) would not be

[3] Field Assistance Bulletin 2012-02RR (July 30, 2012), Question 16

unreasonable. Similarly, whether a target asset allocation is representative of the actual holdings of a designated investment alternative is dependent on the facts and circumstances; however, in the Department's view, target percentages ordinarily would be representative of an alternative's actual holdings if they are nearly equal to the daily average of the alternative's ratios of stocks and bonds (*e.g.*, 50% stocks, 50% bonds) over a reasonable period of time. The Department anticipates there are other similarly acceptable methods of determining whether target percentages are representative of actual holdings.

We additionally note that the statutory standard of "reasonably representative of the asset class holdings" indicates more flexibility than the current regulatory standard of "representative of the actual holdings." As a result, we believe this current language from the Department, including the acknowledgment that there could be a variety of acceptable methods, can help maintain appropriate flexibility, while also providing participants with an appropriate means to compare their investments.

III. DC Plan Fee Disclosure Improvements (Questions 11-13)

We strongly support participants having information about their investments and understanding the costs of the services they receive. For those reasons, we have been supportive of 404(a)(5) participant disclosure, 408(b)(2) plan sponsor disclosure and Form 5500 Schedule C reporting. We were actively engaged as the Department worked on enhancing services provider fee disclosure.[4] We are concerned; however, about any new changes to long-standing requirements that may increase cost to plan participants without there being a corresponding benefit. We believe that participants have a wealth of information at their fingertips. In fact, we sometimes are concerned that participants view the collection of required disclosures from different regulators (e.g, IRS, SEC and DOL) as too much information, and participants might be better served with concise, layered disclosure. This view is well documented in the behavioral economics literature and has helped other regulators tailor their disclosure requirements.[5]

The 404(a)(5) plan participant disclosure form covers investment product fees, plan administration expenses, management fees, mortality risk and administrative expenses fees, as well as expense ratios and other costs where appropriate. This is a comprehensive document that provides the appropriate fee disclosure to help plan participants understand their plan fees.

[4] On February 3, 2012, the Department published a final rule in the Federal Register concerning disclosures that must be furnished before plan fiduciaries enter into, extend or renew contracts or arrangements for services to certain pension plans in order for such a contract or arrangement to be "reasonable," as required by ERISA section 408(b)(2), 77 FR 5632 (Feb. 3, 2012). That rule required disclosure to all existing clients by April 1, 2012, a date that was then extended to July 1, 2012.

[5] See, e.g., Fee Information in Investment Company Advertisements, Investment Company Act Release No. 33963 (Aug. 5, 2020) [85 FR 70716 (Nov. 5, 2020)] ("Proposing Release") at nn.30 & 32 and accompanying text.

IV. Unenrolled Participants (Questions 14-16)

Section 320 of SECURE 2.0 provides that no required disclosures, notices or other plan documents must be furnished to unenrolled participants, except for (1) an annual reminder notice of eligibility and (2) any document they request that they could have received had they requested it as a participant. The Department asks whether there is any guidance needed to implement this section. We do not believe any additional guidance is needed for this section to be implemented.

V. Paper Statements (Questions 19-21)

Section 338 of SECURE 2.0 requires at least one paper statement per year for an individual account plan, and one statement every three years for a defined benefit plan. There are exceptions for plans that follow the 2002 safe harbor, as well as plans that allow participants to choose e-delivery. Additionally, the Secretary must change e-delivery rules to require a one-time paper notice before electronic delivery, telling participants that they may receive required disclosure on paper.

Electronic delivery provides retirement plan participants useful tools and real-time access to information about their retirement benefits. Participants are able to access copies of statements, search for information, and access educational materials to help with retirement planning. Electronic delivery allows for improved communication between sponsors and participants which also makes it easier for participants to act on the information – whether through a hyperlink or by direct reply on an e-mail.

The interactive nature of electronic access via links and embedded information makes participant action and engagement easier and more likely to occur. One study found that 401(k) participants who interact with their plan's website tend to have higher contribution rates.[6]

We believe the Department should help encourage expansion of electronic delivery of information as the best means for participants to interact with their plan.

In Question 21, the Department heads in a completely different direction in asking about modifying both the 2002 safe harbor as well as the 2020 safe harbor to condition them on access in fact. We believe this is the wrong direction for the Department to consider. Further, we believe this goes beyond the Department's statutory authority.

The 2002 safe harbor has been working well in providing information efficiently to plan participants, while saving plan fiduciaries and employers the costs and burdens of providing paper statements for those who do not request them. The move towards electronic delivery of information since 2002 has been beneficial to participants by saving costs as well as providing for a better experience through hyperlinks, embedded information and the immediacy of information only available through modern technologies. Any new burdens imposed on the safe harbor would increase costs for no benefit. The Department's only change that should be made

[6] https://peterswire.net/wp-content/uploads/2018-Update-to-Delivering-ERISA-Disclosure-for-DC-Plans-002.pdf

with regard to the 2002 safe harbor is to put in place a one-time paper notice requirement related to the availability to request paper documents as required under SECURE 2.0. It is unnecessary to include updates to the 2002 safe harbor that would require an initial paper notice with a level of detail similar to that required by paragraph (g) of the 2020 safe harbor.

With regards to any move towards a requirement of "access in fact," it is important to note that any movement in that direction is outside the scope of the statutory authority granted with this provision of SECURE 2.0. We would see any movement in this direction as rolling back in time. Electronic delivery empowers participants and engages them in their retirement planning.

VI. Conclusion

We look forward to working together with the Department as they review those items required under SECURE 2.0. Please do not hesitate to contact me at lbleier@sifma.org or (202) 962-7329 if you have any questions.

Respectfully Submitted,

Lisa Bleier