October 10, 2023

Submitted Electronically

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

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

To whom this may concern:

WTW is a leading global advisory, broking and solutions company. At WTW, we provide data-driven, insight-led solutions in the areas of people, risk and capital. Leveraging the global view and local expertise of our colleagues serving 140 countries and markets, we help organizations sharpen their strategy, enhance organizational resilience, motivate their workforce and maximize performance.

**Background**

We appreciate the opportunity to provide our input and recommendations in support of future action by the DOL regarding a number of provisions of Division T of the Consolidated Appropriations Act, 2023, (Dec. 29, 2022) ("SECURE 2.0 Act").

The DOL published a Request for Information (RFI) on August 11, 2023 (88 FR 54511). We have responded to some of the questions posed in the RFI, which are identified by number, below.

The undersigned have prepared these comments with input from others in the company.

**A. Pooled Employer Plans**

**A1. 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 agree that Form PR should be updated to include reporting of the name and EIN of the named fiduciary(ies) designated to be responsible for collecting contributions to the plan. Existing language in the Instructions should also be revised to reflect the change. For example, the Form PR Instructions currently provide that: "…the plan document for the pooled employer plan must … designate one or more **trustees** (other than an employer in the plan) to be responsible for collecting contributions to, and holding the assets of, the plan, and require the **trustee(s)** to implement written contribution collection procedures that are reasonable, diligent, and systematic…" Aside from updating Form PR and the Instructions, we do not think any guidance is necessary to implement the statutory change.

**A2. In addition to the Form PR and the Form 5500 Annual Report, what are other data sources the Department could use to collect data on the topics enumerated in SECURE 2.0 section 344(1), e.g., the fees assessed in such plans, or the range of investment options provided in such plans?**

We think the Form PR and the Form 5500 are the appropriate sources for the Department to use to gather data on the topics specified in SECURE 2.0 section 344(1). To the extent the information currently available in those forms is insufficient for purposes of the study, the Department should expand or refine the information reported by pooled plan providers on Form 5500, Schedules and attachments as part of the Form 5500 Improvement Project (RIN 1210-AC01).

**A3. The Department interprets the language in section 344(1)(C) of SECURE 2.0 requiring identification of "the range of investment options provided in such plans" to mean the specific investment options the responsible plan fiduciary has selected as "designated investment alternatives" under the plan. The Department does not, for example, consider this language to require examination of the potentially large range of investments available through a brokerage window or similar arrangement, to the extent offered in a PEP. What would be efficient and comprehensive methods for the Department to determine the range of designated investment alternatives for all PEPs?**

We agree that section 344(1)(C) of SECURE 2.0 requires identification of "the range of investment options provided in such plans" should be interpreted to mean the investments selected as "designated investment alternatives." The most efficient and comprehensive method to gather such information would be through Form 5500 filings. Schedule H, Line 4(i) requires that a "schedule of assets held for investment purposes" be attached to the Form 5500 filing. Also, when a Form 5500 is filed for a plan with assets invested in pooled funds that are direct filing entities (i.e., collective trusts, pooled separate accounts), the plan administrator is required to complete Schedule D. To the extent the information provided on these schedules is insufficient for the study required by SECURE 2.0 – for example, filers are not currently required to identify an investment as a designated investment alternative or QDIA – we think the Department could expand the information provided as part of the Form 5500 Improvement Project (as noted in our response to Question 2).

**A4. Section 344(1)(E) of SECURE 2.0 requires the study to focus on the "manner in which employers select and monitor such plans." How and by whom are PEPs most commonly marketed to employers? Do marketing techniques differ based on the size of employers? How often do employers rely on the advice of others when selecting and monitoring a PEP? If so, who gives this advice to employers, generally, e.g., consultants, financial advisors, brokers, record keepers, others? In addition to this RFI, are there other efficient and comprehensive methods for the Department to solicit information on the steps employers take to select and monitor PEPs and to decide to stay in the PEPs? For instance, should the Department consider a public hearing, focus groups, questionnaires, online polling, or other similar information gathering techniques? From whom should the Department solicit this information (i.e., directly from employers, pooled plan providers, or both), using these other techniques?**

In our experience, plan fiduciaries select a pooled plan provider in the same way that they select all service providers – following a prudent process and considering all relevant information (e.g., quality of administrative services, investment options available, fees and fee transparency, plan features, tools to assist with retirement planning, and numerous other factors). Given this, the Department may wish to refer entities considering joining PEPs to the Department's "Tips for selecting and monitoring service providers for your employee benefits plan" article to reinforce this practice (See https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/tips-for-selecting-and-monitoring-service-providers.pdf)

**A5. Section 344(1)(F) of SECURE 2.0 requires the study to focus on the disclosures provided to participants in such plans. What would be efficient and comprehensive methods for the Department to collect examples of such disclosures or otherwise solicit information from employers, PEPs, plan administrators, or other parties on the disclosures provided to plan participants? Is there additional or**

**different information that should be disclosed to participants in the context of PEPs, versus what is required to be disclosed under ERISA to participants in other defined contribution plans? If so, why, and what other additional disclosures should be required in the context of PEPs?**

In our experience, the disclosures provided to participants in PEPs are essentially the same as the disclosures provided to participants in other defined contribution plans. We note that the Department recently updated the prescribed format for the Summary Annual Report (SAR) to advise participants about new Schedule MEP and the information it contains. That said, we have not identified any additional or different information that would be useful to PEP participants.

**A6. Section 344(1)(H) of SECURE 2.0 requires the study to focus on the extent to which PEPs have "increased retirement savings coverage in the United States." How should the Department measure "increased retirement savings coverage" and what information would the Department need to make this assessment? For example, the formation of new PEPs may suggest increased coverage, but if the participating employers previously maintained a retirement plan, that could indicate a transfer of coverage types, rather than an increase in coverage. What are efficient and comprehensive methods for the Department, depending on how "increase retirement savings coverage" is measured, to collect such information?**

We think the most efficient and comprehensive method for the Department to measure how PEPs have "increased retirement savings coverage in the United States," would be through Form 5500 data. For the employers listed on a PEP's Form 5500, Schedule MEP, the Department could determine if the employer previously sponsored a defined contribution plan that was merged into the PEP by searching for prior filings under the employer's EIN. Employers that do not have prior retirement plan filings should generally be a new adopter. To streamline data collection, the Department could expand the information provided on Form 5500, Schedule MEP as part of the Form 5500 Improvement Project. For example, the Department could add checkboxes to the Schedule MEP list of participating employers to identify employers that joined since the prior filing and whether such employers ever previously maintained a retirement plan.

## B. Emergency Savings Accounts Linked to Individual Account Plans

**B7. What guidance, if any, do plan administrators need to effectively implement the requirements of section 127 of SECURE 2.0 and new part 8 of ERISA? Because section 127 of SECURE 2.0 impacts many provisions under ERISA and the Code, commenters are encouraged to be as specific as possible with their responses, with clear citation to the specific statutory provision or provisions in question. If guidance is needed on multiple provisions, commenters are asked to prioritize the issues according to importance and offer a supporting rationale for the priority.**

We respectfully request guidance addressing the following provisions which are important for implementing section 127 of SECURE 2.0. We have listed these items in priority order, with the most important topics listed first.

- Application of PLESA Contribution Limit: ERISA section 801(d)(1) provides that a PLESA may not accept a contribution "to the extent such contribution would cause the portion of the account balance attributable to participant contributions to exceed the lesser of (i) $2,500 or (ii) an amount determined by the plan sponsor of the pension-linked emergency savings account." This section also provides for an annual adjustment of the $2,500 dollar limit.

  Because the PLESA contribution is defined in terms of the account balance "attributable to participant contributions", there is concern that the contributions a participant may make during a year would be impacted by earnings or withdrawals received during that year. This could make the PLESA contribution

limit an impossible-to-administer moving target, which would significantly interfere, if not prevent, plan sponsors and recordkeepers from being able to administer a PLESA.

Guidance is requested providing plan sponsors with flexibility to exclude changes in the PLESA account balance during a year due to earnings and withdrawals when applying the PLESA contribution limit for that year, including as follows:

1) Earnings. Applying the limit based solely on the PLESA contributions made, and without regard to any earnings. Alternatively, if the DOL's position is that earnings must be counted when applying the PLESA contribution limit, only earnings credited prior to the first day of the plan year must be taken into account (i.e., use a beginning of the year snapshot date for measuring earnings).

2) Withdrawals. The amount of PLESA contributions that a participant may make during a year is not required to increase due to PLESA withdrawals received by the participant during that year. Instead, only withdrawals received prior to the first day of the plan year must be considered when determining whether a participant has reached the PLESA contribution limit.

- Application of limits on Code sections 402(g) and 415: A PLESA is subject to specific contribution limits described in ERISA section 801(d)(1). Section 3(45) of ERISA specifies that a contribution to a PLESA must be held in a designated Roth account within the meaning of Code section 402(A). Roth elective deferral contributions under Code section 402A are subject to the limits described in Code section 402(g) and 415 limits. Guidance is requested clarifying whether or not contributions to a PLESA are subject to and counted against the Code section 402(g) and 415 limits.

- Application of mandatory cashout limit: Code sections 411(a)(11) and 401(a)(31)(B) allow a plan to provide for a mandatory distribution to a participant without the participant's consent if the present value of the accrued benefit exceeds a specified amount. Guidance is requested clarifying whether the balance of the PLESA counts towards the Code sections 411(a)(11)/401(a)(31)(B) mandatory cashout limit.

- PLESA requirements applicable to Church/Governmental Plans that are not Subject to ERISA: There are questions regarding the application of the PLESA rules to non-electing church plans and plans sponsored by governmental entities, which are not subject to ERISA. While many of the PLESA requirements are incorporated into both ERISA (sections 3(45) and 801) and the Code (sections 402A(e)), there are certain provisions, including the investment requirement and limits on distribution fees, which are only included in the ERISA provisions.

  Code section 402A(e) provides that a PLESA is available to an applicable retirement plan, which includes governmental 457(b) plans and non-electing church plans. Neither of these plans are subject to ERISA. Code section 402A(e)(5) requires disclosure of the PLESA provisions identified only in ERISA section 801, but it is not clear whether these requirements are applicable to plans not subject to ERISA. Therefore, guidance is requested clarifying whether governmental 457(b) plans and non-electing church plans that intend to offer a PLESA, are required to comply with those PLESA requirements which are only reflected in ERISA section 801 or which are reflected in the disclosure requirement provided in Code section 402A(e)(5).

- Transfers following termination of employment: ERISA section 801(e) allows a participant, upon termination of employment, to elect to transfer the PLESA balance "into another designated Roth account of the participant under the individual account plan". Guidance is requested to confirm whether the balance in a PLESA may be transferred to any designated Roth account of the participant in "any"

individual account plan in which the participant participates, or only in the plan to which the PLESA is linked.

- Availability for safe harbor plans: Guidance is requested confirming that a PLESA may be adopted by a 401(k) or 403(b) plan which is intended to satisfy a nondiscrimination safe harbor under Code sections 401(k)(12) and 13 (applicable only to 401(k) plans) and Code sections 401(m)(10) and (11) (applicable to both 401(k) and 403(b) plans). For plans that intend to satisfy one or more of these safe harbors with matching contributions, one of the requirements is that the rate of matching contributions with respect to elective contributions or elective deferrals (as applicable) for any highly compensated employee may not be greater than such rate with respect to a non-highly compensated employee.

  It appears that a PLESA is intended to be available to safe harbor plans: ERISA section 801(d)(4)(A) provides that PLESA deferrals must be eligible for matching contributions and includes a coordination rule that matching contributions are first attributable to elective deferrals other than contributions to the PLESA (to ensure compliance with the contingent benefit rule). In addition, ERISA section 801(d)(3)(C) provides that the required PLESA notice may be consolidated with the safe harbor notice required by Code section 401(k)(13)(E), which applies to plans that either provide for safe harbor matching contributions or include matching contributions that are intended to satisfy an ACP safe harbor. However, an explicit statement confirming that a PLESA is available for a safe harbor plan would help to address uncertainty due to the absence of a specific provision regarding safe harbor plans (for comparison, see Code section 401(m)(13)(B)(iii) with regard to the ability of safe harbor plans to offer matching contributions for qualified student loan payments).

**B8. Would administrators of plans that include PLESAs benefit from a model notice or model language for inclusion in the required notice under section 801 of ERISA? If so, commenters are encouraged to submit suggested model language.**

Model language would be helpful to plan sponsors, likely resulting in a significant time and expense savings. It is difficult to provide a sample notice or language until guidance is issued. However, it appears that the IRS Sample Automatic Enrollment and Default Investment Notice (See https://www.irs.gov/pub/irs-tege/sample_notice.pdf) would serve as a helpful starting point for a model PLESA notice, as many of the PLESA notice requirements are topics which are covered in the sample Automatic Enrollment and Default Investment Notice.

**D. Defined Contribution Plan Fee Disclosure Improvements**

**D12: Is there evidence that the subject regulation could or should be improved to help participants better understand the fees and expenses related to their participant-directed individual account plans? For instance, is there additional or different content, not required under the current regulation, that could enhance participants' understanding of the costs associated with participating in their plan, including the costs of their available investment options? In addition, are there additional or different design, formatting, delivery, or other similar characteristics, not required under the current regulation, that could improve the effectiveness of these disclosures? If so, how should improvements be incorporated into the subject regulation?**

We have seen a wide variety of approaches to meeting participant fee disclosure requirements, with this almost always being fulfilled by the plan's recordkeeper as a service to the plan fiduciary. Most disclosures will number many pages and are often written using language more consistent with a prospectus than a Summary Plan Description (SPD). Many plan sponsors and fiduciaries offer additional support to participants for making investment decisions, ranging from other communications to digital or one on one advice, with such support most often including discussion of factors in addition to cost.

The Department could support improved participant fee disclosures through two key steps:

1) Requiring the notice to open with SPD like language and allowing SPD language throughout; and

2) Requiring that each notice begin with a summary chart of key information that includes an invitation to continue reading and one or more contacts for further information; see below for details and a sample.

Regarding the second key step suggested above, we think the critical items to disclose are (i) the expected rate of participant paid fees for recordkeeping that is independent of participant initiated transactions or services; (ii) if additional fees can be triggered by participant initiative an explanation or list of these potential fees (or alternatively, a hybrid of these two approaches), a list of all specific participant triggered fees to be provided after the summary (if not in the summary); and (iii) either the range of expense ratios for each designated investment alternative, the expense ratio(s) for the QDIA and a range for alternative investments, or alternatively the expense ratios for all designated investment alternatives.

For plans that provide the fee disclosure in (i) and/or (ii) above as a percentage of a participant's account balance, we believe that the expense ratio info provided in (iii) above should specify whether the expense ratio includes the participant-initiated fees described in (i) and/or (ii). We also recommend allowing the asset-based disclosure to be described in terms of basis points, percentages, $ out of $1,000 or any combination of the three in the opening summary. In addition, the summary can provide one or more contacts for follow up questions from participants, including to have one contact for general questions and additional contacts for more specific ones identified following the summary.

Our suggestions are intended to allow flexibility consistent with encouraging creativity to achieve an opening summary that meets SPD language criteria, and that equips participants with key information at a glance as well as with the opportunity to obtain additional information.

Here is a *Sample* Overview Language that we believe would reflect our recommended key steps suggested above:

> *You pay [$X or .xx % or a combination of $Y and .yy%] a year in recordkeeping fees. Additional fees may apply for certain transactions that you can initiate and new services that you may select. New participants are automatically invested in our __ Fund which has an expense ratio of AA bp and provides automatic diversification and asset reallocation through retirement [sample assumes this is a "through" target date fund]; all participants may select from both the __ Fund and other funds in our core line up; the other funds in our core line up have expenses that range from __ to __ bp.*
>
> *If you would like more details please keep reading, and if you have questions, you may contact [ ].*

### F. Requirement to Provide Paper Statements in Certain Cases

**F19. What modifications or updates to the 2002 safe harbor are needed to implement section 338 of SECURE 2.0? Commenters are encouraged to consider whether any additional information (other than a statement of the right to request that all documents required to be disclosed under ERISA be furnished on paper in written form) should be included, and whether there are other standards that should apply to the required one-time initial paper notice that must be furnished for compliance with 29 CFR 2520.104b-1(c), the 2002 safe harbor? For example, should the 2002 safe harbor be modified or updated to include an initial paper notice that resembles the initial paper notice required by paragraph (g) of the 2020 safe harbor regulation?**

Section 338 of SECURE 2.0 provides that if a plan permits participants and beneficiaries to request that pension benefit statements be furnished by electronic delivery, no paper statement must be furnished to ***individuals who request electronic delivery*** if the statements are so delivered. Separately, 29 CFR §2520.104b-1(c)(2)(ii) permits participants to affirmatively opt into electronic delivery. Consequently, benefit systems may allow participants and beneficiaries to record electronic delivery preference with respect to certain disclosures required by ERISA in accordance with the 2002 safe harbor. We hereby request clarification that any such electronic delivery preference of a participant or beneficiary pursuant to 29 CFR §2520.104b-1(c)(2)(ii) is treated as an electronic delivery request for this purpose. Further, we request clarification that no paper benefit statement is required to be furnished if a participant or beneficiary makes a telephonic request to receive a benefit statement electronically, and the plan administrator complies with the request electronically.

**F21: Should both safe harbors be modified such that their continued use by plans is conditioned on access in fact? Can plan administrators (through their electronic delivery systems) reliably and accurately ascertain whether an individual actually accessed or downloaded an electronically furnished disclosure, or determine the length of time the individual accessed the document? If so, should the safe harbors contain a condition that plan administrators monitor whether individuals actually visited the specified website or logged on to the website, as a condition of treating website access as effective disclosure? And, in the event that such monitoring reveals individuals have not visited or logged on to the specified website (meaning that effective disclosure was not achieved through website access), should the safe harbors require that plan administrators revert to paper disclosures or take some other action in the case of individuals whom plan administrators know forsake such access?**

Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”) mandates that the administrator “furnish” to participants and beneficiaries certain materials automatically and other materials upon request. Pursuant to its interpretive authority, the Department of Labor requires that the plan administrator use measures reasonably calculated to ensure actual receipt to fulfil such disclosure obligation. The Department of Labor is soliciting comment as to whether it should raise the bar and require that plan administrators oversee a participant’s access in fact of required ERISA notices.

Arguably, a plan administrator’s duty pursuant to Section 104 of ERISA is discharged when it has furnished the disclosure, regardless of whether the content is accessed. Where a required ERISA notice is furnished by first class mail, a plan administrator is not obligated to monitor whether a participant opens the envelope that includes the ERISA notice or reads the notice. In addition, monitoring access in fact when an electronic medium is used to furnish ERISA notices may contravene a participant’s reasonable expectation of privacy.

Further, we expect that, for many participants, not accessing ERISA notices is intentional. The notion that sending an ERISA notice by paper will cause more participants to engage and read ERISA legal notices is speculation.

Finally, we believe that requiring plan sponsors to monitor “access in fact” would increase plans’ administration, technology and postage costs which would, in turn, be charged against the plan assets. Given the speculative value of adding such a requirement, we do not believe that this would be a good or efficient use of plan assets.

## H. Information Needed for Financial Options Risk Mitigation

**H23. Is there a need for guidance with respect to any of the specific content requirements in ERISA section 113(b)(1)(A) through (H)? If so, please specify the particular content requirement and explain the need for guidance.**

Yes, we believe additional guidance is needed. In particular, please consider the following:

1) We request clarification with respect to the timing on the effective date of these requirements (e.g., is the effective date based on the Annuity Starting Date of the lump sum? The payment date? The window opening date?). We expect that after any new guidance takes effect, it will take 9-12 months to execute a lump sum offer from the initial planning stages to the payment date, thus sponsors will need sufficient lead time for implementation.

2) We request clarification as to whether ERISA section 113(b) applies to lump sum offers that are made as part of a standard plan termination, or if such offers are exempt from some or all of the requirements. In particular, there are potential conflicts between the timing to announce the offer and the timing requirements for the distribution of plan assets in the event of a plan termination. If ERISA section 113 applies to lump sum offers upon plan termination, then we request guidance regarding how to resolve any such conflicts.

3) The advance notice is required to show the lump sum and annuity amounts specific to each individual. Pertaining to this:

   a) Must the amount shown in the notice be the exact amount in the forthcoming offer, or may it be an estimate? In particular, there may be situations in which the amounts are not yet knowable, e.g., due to the lookback month defined in the plan. We request clarification that reasonable estimates are allowed where precise calculations cannot be performed.

   b) What communication, if any, is required should a participant become no longer eligible for a window (e.g., if the participant is rehired) after having received a required disclosure pursuant to ERISA section 113? We believe that the overarching duty to not mislead in plan communications obligates a plan fiduciary to communicate ineligibility under these facts. We do not believe that ERISA section 113 obligates a new disclosure under these facts, nor do we believe that prescriptive rules are necessary or desirable in light of the overarching fiduciary duty to not mislead.

   c) Are there any exemptions to the 90-day advance notice requirement to allow a participant to be added to a lump sum offer, e.g., a participant was inadvertently excluded in spite of a diligent effort to identify the eligible group, a participant files an appeal to be included in a lump sum offer and the plan administrator accepts the claim, etc.?

   d) We request clarification that a plan sponsor can revoke a lump sum offer after an ERISA 113 communication is made, provided the right to revoke was sufficiently reserved and disclosed.

4) Section E requires that the participant be informed about the risks of taking the lump sum, but there are also risks associated with not taking the lump sum. Is there consideration of requiring discussion of such risks in the notice? And may that discussion be added if not required? In particular the Government Accountability Office had a list of potential positive ramifications of accepting a lump sum in their 2015 study, which include:

   - Potential inflation protection (depending on investment choices and actual returns)
   - Potential to leave a bequest to a beneficiary other than a spouse
   - Ability to consolidate retirement assets
   - Control over investment decisions

- Possibility of earning favorable investment returns (compared to the rates inherent in the annuity conversion)

**H24. ERISA section 113(b)(1)(E) requires the notice to specify, in a manner calculated to be understood by the average plan participant, the "potential ramifications of accepting the lump sum." Beyond the specific items set forth in ERISA section 113(b)(1)(E), what other potential ramifications should the Department consider incorporating into regulations under ERISA section 113, and why?**

Other potential ramifications the Department should consider including are the following; however, we note that these items may not apply to every lump sum program, so there should be flexibility to include or exclude where they are applicable:

1) Potential loss of value of early retirement subsidies
2) Loss of potential benefit increases due to pay increases if the participant is rehired
3) Potential loss of eligibility for non-pension benefits
4) Loss of potential future ad-hoc cost-of-living adjustments

**H25. Are transactional complexity, aging and cognitive decline, and financial literacy relevant factors the Department should consider when deciding to add to the list of potential ramifications in making regulations under section 113 of ERISA? Risk transfer transactions are by nature inherently complex involving uncertainty. Some behavioral finance professionals suggest that more and better information by itself is unlikely to ensure that people, even with average financial literacy, make good choices in the cognitively challenging task of choosing between an annuity and a lump-sum payout. Despite such challenges, are there ways to structure and present the notice that would increase the likelihood of better decisions and retirement outcomes?**

Participants who have diminished capacity present a challenge to plan fiduciaries, as this area is currently governed by a variety of state laws and plan fiduciaries are not experts in mental capacity. These issues are not unique to lump sum windows, and unfortunately create challenges for both defined contribution plans as well as for defined benefit plans in general. We encourage the Department to consider diminished capacity as an area for future rulemaking or sub-regulatory best practice guidance to support plan fiduciaries that want to ensure that they are acting in the best interest of participants and beneficiaries and paying the right person, as a separate project. We do not believe that bolstering the content requirements of ERISA section 113 will mitigate financial harm related to diminished capacity, and the deep study and input from a broad range of stakeholders that would be necessary for the development of any guidance seems beyond the scope of these disclosures.

**H26. Are there mandatory notices or disclosures under the Code that the Department should factor into the development of regulations under section 113 of ERISA? If so, which notices and disclosures, and how should they be factored into regulations under section 113 of ERISA?**

Annual Funding Notice – The notice requirement under section 113 will require plan sponsors to make decisions regarding whether to execute on a lump sum offer much further in advance than under current requirements. As a result, plan sponsors may need to decide whether to proceed with a lump sum offer before the beginning of the plan year in which the offer will be made. This could potentially make the lump sum offer subject to the Material Effect Event rules, whereby participants may need to be notified of a future offer in the Annual Funding Notice before any notification to participants affected by the offer occurs. If participants receive notice of the lump sum offer in the Annual Funding Notice, it would complicate the ability of a plan sponsor to decide not to proceed with the lump sum offer even if the section 113 disclosure (or other notice of the offer) has not yet been distributed to participants, as well as providing participants with premature, incomplete information about the offer. We believe

this is not the intent of section 113, and ask that a lump sum offer be exempt from the Annual Funding Notice's Material Effect Event rules unless notification of the offer has already been sent to participants.

**H28. ERISA section 113 contains a pre- and post-election window reporting framework under which plans must report information relating to the lump sum offerings and elections to the Department and the PBGC. In addition to the number of participants and beneficiaries who accepted the lump sum offer, the Department has authority to require plans to furnish "such other information as the Department may require" in the post-election report. Separately, the Department itself must report information about offerings and elections to Congress on a biennial basis. The Department also must post on its website for public consumption the information it receives under this reporting framework. The Department is considering what information should be reported to the Department to ensure that the Department can effectively discharge its monitoring, enforcement, public disclosure, and biennial reporting obligations under ERISA. To these ends, what data or information other than the number of participants and beneficiaries who were eligible for and accepted lump sum offers should be reported to the Department, and why? For instance, should the Department collect demographic information on those individuals who elected lump sum offers and, if so, what information? This information could, for instance, enable the Department to provide Congress with more detailed information on the cohorts of participants and beneficiaries who accept lump sum offers as compared to those who do not.**

While post-election reporting will be required by law, we encourage the Department to weigh the value of any such reporting with the attendant administrative burden as defined benefit plans are already subject to extensive regulation, participant disclosure and government reporting. Further, the reporting of demographic information, even in the aggregate, may contravene a participant's reasonable expectation of privacy.

**Additional Items under H that are not included in the questions:**

1) Pertaining to the advance notice to DOL and PBGC, are changes to the counts and/or offer length allowable after the notice? If so, will a revised notification be required?

2) It may be helpful to clarify details about the public notice. In particular, when will the information sent to the DOL and PBGC become public? How will confidentiality be protected, as noted in the law? Will the plan sponsor's name ever be included?

## I. Defined Benefit Annual Funding Notices

**I29: Is there a need for guidance with respect to any of the amended content requirements in section 101(f)(2)(B) of ERISA? If so, please specify the provision and explain the need for such guidance.**

We do not believe that any additional guidance is necessary.

**I30: Is there a need for guidance on the interrelationship of the new definition of "percentage of plan liabilities funded" in section 101(f)(2)(B) and the segment rate stabilization disclosure provisions in section 101(f)(2)(D)? When applicable, the segment rate stabilization disclosure provisions continue to use the funding target attainment percentage. In responding to this question, commenters are encouraged to address the extent to which participants and beneficiaries would find value in, or alternatively be confused by, two different funding percentages for the same plan.**

We do not believe that any additional guidance on the interrelationship of the new definition is necessary for plan sponsors to prepare the notice.

We believe that participants and beneficiaries will not find value, and will continue to be confused by, disclosure of more than one funding percentage for the plan. We believe that the end of year market basis measurement is most relevant.

**I31: Existing regulations under section 101(f) of ERISA contain a model notice for single-employer defined benefit plans. The Department is interested in suggestions and comments on how to modify the model to reflect the amendments to section 101(f) of ERISA by SECURE 2.0, and for improvements more generally.**

We suggest that the Department provide sample language for the required statement of the circumstances when participants and beneficiaries may receive benefits in excess of the amount guaranteed by the PBGC so that use of the model notice ensures compliance with regard to this particular content requirement.

We suggest eliminating the requirement to provide the projection of the effect of a material event to the end of the current year and allowing the effect of the material event to be estimated as of end of the notice year using the market value disclosures.

We also suggest eliminating the requirement to provide a statement of the number of participants and beneficiaries for the plan year to which the notice relates as of the last day of such plan year because we believe that many plan sponsors will be unable determine the precise counts by the time that the Annual Funding Notice needs to be prepared. We ask that providing beginning of year numbers continue to be permitted. We further believe that the use of estimates of year-end participant counts for this purpose will not be helpful to the participant and likely create confusion if compared to actual counts reported on the Form 5500 and/or the following year's Annual Funding Notice.

## Conclusion

We appreciate the DOL considering these comments. Please contact any of the undersigned if you have any questions or would like to discuss our comments in more detail.

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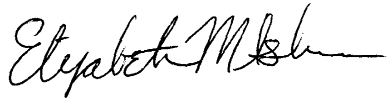

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