PENSION RIGHTS CENTER
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October 18, 2023

Attn: Kristen Zarenko *Submitted via Email*
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-AC-23**

The Pension Rights Center is pleased to respond to this Request for Information on the vitally important topic of disclosures to participants.

Founded in 1976, the Pension Rights Center is a national nonprofit, nonpartisan consumer organization committed to protecting and promoting the retirement income security of workers, retirees, and their families. With support from the Administration for Community Living, PRC provides direct services to more than 2,000 individuals annually, as well as serving as the technical advisor for six regional pension counseling and information projects covering 30 states, which provide hands-on help to individuals with retirement income problems. PRC's work helping individuals informs our policy work and helps us to identify systemic problems in the private pension system.

Fifty years ago, the drafters of ERISA recognized the key role of participant disclosures in the success of the retirement system. Plan disclosures are crucial to participants' understanding of and ability to benefit from their retirement plans. Now more than ever, with the prevalence of self-directed 401(k) plans, participants need clearly stated information about how their plans work in order to maximize their benefit amounts for future retirement, and to manage the benefits during their retirement years. Additionally, plans must monitor disclosures furnished electronically to ensure that participants not only have accessed the website but also have opened or downloaded the disclosures to view the content.

Our comments on selected RFI questions are presented by subject and question number.

Performance Benchmarks for Mixed Asset Allocation Funds

Question 9: Are there additional factors beyond the criteria in section 318 of SECURE 2.0 that plan administrators should use to ensure they can effectively select and monitor, and participants and beneficiaries can effectively understand and utilize, blended performance benchmarks for mixed asset class funds? If so, why, and what are the other factors the Department should consider when developing regulations? Commenters are encouraged to review the Department's prior guidance on the use of blended performance benchmarks, albeit as secondary benchmarks, for purposes of the participant-level disclosure regulation; the standards for use of a "reasonable"

blended performance benchmark therein are similar, but not identical, to the four criteria in section 318 of SECURE 2.0.

Existing DOL participant disclosure regulations require that each investment alternative's historical performance is compared to an appropriate broad-based securities market index. However, the rule does not address increasingly popular investments like Target Date Funds (TDFs) that include a mix of asset classes.

While the DOL's 2013 publication, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries*, provided guidance on many of the important and unique considerations for TDF evaluation and selection, it did not change the rules for benchmark comparison disclosures to participants.

The SECURE 2.0 Act of 2022 (SECURE 2.0) requires the DOL to modify existing regulations so that an investment using a mix of asset classes can be benchmarked against a blend of broad-based securities market indices, provided that:

- The index blend reasonably matches the fund's asset allocation over time,
- The index blend is reset at least once a year and
- The underlying indices are appropriate for the investment's component asset classes and otherwise meet the rule's conditions for index benchmarks.

The Pension Rights Center urges the Department to require, as much as possible, that each element of a blended performance benchmark for multiple asset classes be comprised of nationally recognized and publicly available benchmarks. Plans and industry should be prohibited or discouraged from creating non-public benchmarks primarily for the purpose of demonstrating that a plan investment option does not deviate substantially from the benchmark created primarily to validate the plan's usage of the investment option.

When Congress and EBSA proposed the usage of an investment benchmark to enable plans and participants to understand and determine if the plan and their investment selections were prudent, they primarily envisioned comparison to the most widely used investment benchmark in the world — the Standard and Poor's Fortune 500. According to Wikipedia, the **Standard and Poor's 500**, or simply the **S&P 500**,[5] is a stock market index tracking the stock performance of 500 of the largest companies listed on stock exchanges in the United States. It is one of the most commonly followed equity indices. Study after study has found the S&P 500 has had the best investment performance over almost every investment period of time. There is only one reason investment firms do not want to use the S&P 500 as the benchmark to an investment, single or multi-class — the investment return of their selected investment does not outperform it. EBSA has conducted several reviews and substantiated the reliability of the S&P benchmark.

The Department's regulations establishing criteria for plan investment benchmarks contained similar findings and held:

"The Department continues to believe that appropriate benchmarks may be helpful tools for participants to use in assessing the various investment options available under their plans and, therefore, has retained this requirement in the final rule. However, benchmarks are more likely to

be helpful when they are not subject to manipulation and are recognizable and understandable to the average plan participant, as is the case with broad-based indices contemplated by Instruction 5 to Item 27(b)(7) of Form N–1A. For this reason, the final rule retains the proposed requirement that a benchmark must be a broad-based securities market index and it may not be administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used. The Department, however, notes that paragraph (d)(2)(ii) of the final regulation permits the disclosure of information that is in addition to that which is required by this final regulation, so long as the additional information is not inaccurate or misleading. Thus, in the case of designated investment alternatives that have a mix of equity and fixed income exposure (*e.g.,* balanced funds or target date funds), a plan administrator may, pursuant to paragraph (d)(2)(ii) of the final rule, blend the returns of more than one appropriate broad-based index and present the blended returns along with the returns of the required benchmark, provided that the blended returns proportionally reflect the actual equity and fixed-income holdings of the designated investment alternative. For example, where a balanced fund's equity-to-bond ratio is 60:40, the returns of an appropriate bond index and an appropriate equity index may be blended in the same ratio and presented along with the benchmark returns mandated by paragraph (d)(1)(iii) of the final rule. Presenting blended returns that do not proportionally reflect the holdings of the designated investment alternative would, in the view of the Department, be misleading and, therefore, not permitted pursuant to paragraph (d)(2)(ii) of the final regulation."

The PRC urges and supports regulations permitting plan usage of prudently selected and monitored blended performance benchmarks for multi-investment asset classes that are public and nationally recognized and not crafted primarily to not outperform the plan selected investment option.

Question 10: Section 318 of SECURE 2.0 also requires that the Department, not later than three years after the applicability date of such regulations, deliver a report to Congress regarding the utilization, and participants' understanding of these benchmark requirements. Comments are solicited on methods the Department might use to assess whether, and the extent to which, participants understand the type of benchmark described in section 318 of SECURE 2.0.

DOL/EBSA should periodically survey participant understanding of key retirement plan features, including investment options, performance and benchmarks.

As the Department noted in its 2010 disclosure regulations, it has, in the past, used focus groups to assess participant understanding of investments and disclosures. The PRC supports the use of focus groups and is happy to assist the Department as appropriate. As technology and industry disclosure and investment practices change frequently, PRC strongly urges the Department of Labor to periodically assess participants' understanding of information.

From the Department's 2010 regulation —

"The Department also employed focus groups, as discussed above, to learn more about how participants make investment decisions and whether the Department's proposed Model Comparative Chart would in fact assist such decisions. The Department believes that the

investment-related disclosure requirements of the final rule, discussed below, strike an appropriate balance between accommodating, on one hand, the increasing innovation and complexity of the types of investments that are available to plan participants and beneficiaries and, on the other hand, participants' and beneficiaries' need for complete, but concise and user-friendly, information about their plan investment alternatives."

Defined Contribution Plan Fee Disclosure Improvements

These initial comments are limited in scope. As the Department proceeds to evaluate fee disclosure requirements, we anticipate additional opportunities to comment and make suggestions.

Question 12: 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?

It is well documented that high fees can significantly reduce investment returns over time. Participants need clear and transparent information about the fees associated with their investment choices and easy access to that information. Individual benefit statements with personalized plan-related fee information in dollars may be one of the most helpful sources to participants. However, the regulations do not require that plan-related fees be unbundled from investment fees so that they can be reported on benefit statements. Bundled fees are not reported on benefit statements, and thus participants cannot get a full picture of the plan-related fees they are paying from their benefit statements. In 2008 comments to the Department at the time of the proposed fee disclosure regulations, the Pension Rights Center stated "Particularized information about the nature and size of fees is critical to responsible investing. When fees are bundled, however, participants are denied this information. Fee unbundling is critical to providing participants with the information they need to choose among investment alternatives (and decide whether to participate in the plan)."

We continue to believe that fees should be unbundled for participant fee disclosures. Additionally, we recommend that the Department require benefit statements to include a brief list of other fees that are charged to their accounts and where to find that fee information. We also recommend that benefit statements include a sentence on how and where to access fee information on the EBSA website that shows the impact of fees on investment returns over time.

The method of delivery of fee information can be just as important as the information itself. If the information sent cannot be accessed, it is of no use.

We have made extensive and detailed objections to the recently adopted "Notice and Access" delivery system which is particularly harmful to participants in self-directed defined contribution plans who must manage their own investments in order to provide a secure retirement for themselves and their family. This delivery system, where participants must search the internet for required information, makes it less likely that plan participants will make the effort to find and evaluate the fees charged on their investments. Similarly the ability to review and compare

fees charged over time can depend on the ability to retain the information provided in previous fee disclosures.

We recommend that EBSA conduct focus groups with a statistically representative cross-section of participants and beneficiaries, perhaps oversampling demographic groups that are less likely to have access to computers and broadband internet, to assess if they are receiving, reviewing and understanding fee and other disclosures and how best to improve fee disclosures.

Eliminating Unnecessary Plan Requirements Related to Unenrolled Participants

Question 16: Is there additional information that the Department, in consultation with the Treasury Department, should consider for inclusion on the required annual reminder notice to unenrolled participants?

The annual reminder notice to unenrolled participants must be furnished during an annual open season or within a reasonable period prior to the beginning of each plan year. The Labor Department could give some guidance on what is a "reasonable period of time" prior to plan year. Additionally, the notice should be delivered directly to the participant via e-mail or paper. The employee should not have to search the employer's website to find the notice. If the notice is delivered by e-mail, the employer should have a procedure to verify that the notice was received and opened. Also, the notice could include information on the right to opt out after joining the plan and rejoin the plan at a later time, and how that affects vesting. The notice should contain a contact phone number for questions that is directed to a specific person or office and is not just a general number for the human resources department. If notice is furnished by e-mail, the plan should monitor the delivery to ensure the notice is received and accessed by the employee.

Question 17: Would plan administrators benefit from a model notice or model language for inclusion in the required annual reminder notice to unenrolled participants? If so, commenters are encouraged to submit suggested model language, specifically focusing on the key benefits and rights under the plan, with a focus on employer contributions and vesting provisions language. Considering that different plans contain different benefits and rights, and a range of plan-specific employer contribution rates and vesting provisions, is it feasible for the Department to create model language.

A model notice could be helpful, or the Department could identify some key features of typical self-directed 401(k)s to be included in an annual reminder notice in addition to vesting provisions such as; a default contribution level and right to choose a contribution level; automatic increases, if any, in level of contributions; default investment, if applicable, and the right to choose investments and change investment choices and how frequently you can change investment choices; type of 401(k), namely before or after taxes; categories of investment funds by risk (low v. high), and where in SPD to find more information. Most importantly, whom specifically to contact for more information.

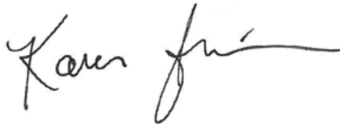
Consolidation of Defined Contribution Notices

Question 22: Are regulations needed? What are the benefits and drawbacks to consolidation for participants?

Consolidation of some of these automatic enrollment notices could benefit participants if the resulting notice is clearly written specifically for the plan of the participant and is not just a notice that includes a string of confusing information cobbled together. Additionally, if a combined notice contains the right to a penalty-free withdrawal from the plan under Code Sec. 414(w)(4), that right should be emphasized in the beginning since it requires a decision or action by the participant. The Department should clarify that the notices be sent by e-mail or paper directly to the employee and include a contact phone number for a specific individual and not just a phone number for the human resources department. Employees and participants should not have to search a website to find a notice. Moreover, plans sending notices electronically must monitor them to ensure that the recipient has opened them.

We appreciate the opportunity to comment on these important issues.

Sincerely,



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