THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Submitted Electronically

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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

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to submit comments on the "Request for Information – SECURE 2.0 Reporting and Disclosure," 88 Fed. Reg. 54511, released by the Employee Benefits Security Administration (RFI) and published in the Federal Register on August 11, 2023. As discussed below, ERIC urges the Department of Labor (DOL or Department), Department of Treasury, and the Pension Benefit Guaranty Corporation to implement the SECURE 2.0 Act carefully, without imposing unnecessary or unactionable new requirements and by carefully considering costs and administrative burdens.

ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state, city, and Congressional district.

Americans engage with an ERIC member company many times a day, such as when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage or snack, use cosmetics, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, or go shopping.

ERIC member companies sponsor retirement plans, including both defined benefit and defined contribution plans, that are governed by the *Employee Retirement Income Security Act of 1974*, as amended (ERISA). Millions of workers and retirees participate in these plans. In this RFI, The

Department has asked many questions that have sparked conversation and interest among ERIC's member companies. The information and views contained in this letter should be viewed as the continuation of the conversation ERIC has had with the Department about these and other provisions. However, as the Department proposes regulations or issues guidance, ERIC will likely have additional substantive comments.

DOL Should Provide Helpful Guidance on Emergency Savings Accounts Linked to Individual Account Plans

ERIC member companies are committed to facilitating holistic financial wellness for their employees. In particular, ERIC is concerned that retirement plan participation may disproportionately suffer when participants fear their savings are "locked in" to retirement accounts and unavailable in case of true emergency. Therefore, ERIC supported Section 127 of SECURE 2.0, which provided plan sponsors with flexibility to promote emergency savings through "pension-linked emergency savings accounts" (PLESAs). While the provisions implementing PLESAs are effective at the end of this year, we have heard from plan sponsors that implementing guidance is absolutely critical to increasing uptake of these accounts.

Therefore, ERIC applauds DOL for seeking advice on appropriate guidance, which should address:

- **Account limits.** Under the statute, the emergency savings account cannot exceed $2,500 (indexed) in account balance "attributable to participant contributions." Guidance should be issued to clarify:
    - Plan sponsors may apply this limit as an annual limit for administrative efficiency (i.e., once an employee contributes up to the limit for a year, an employer could restrict the employee from making new PLESA contributions until the next plan year, even if the employee takes a withdrawal before then).
    - Any account earnings are not "attributable to participant contributions" for purposes of applying the limit.
- **Eligibility**.
    - Highly-compensated employees (HCE) are not eligible to contribute to a PLESA. DOL should issue guidance explaining what happens if a previously non-HCE, now an HCE, continues making contributions prior to the determination of HCE status. Plans should have maximum flexibility to correct these and other contribution errors without penalty. In addition, the Department should consider giving sponsors additional flexibility in determining HCE status for PLESA eligibility purposes.
    - The Department should issue guidance permitting a plan sponsor to permit an employee to participate in the PLESA even if ineligible to participate in the retirement portion of the plan.

- **Withdrawals**. Under ERISA Section 801(c)(1), withdrawals from PLESAs may be made "at the discretion of the participant." However, the Secretary of Labor may impose "reasonable restrictions," which are not defined in the statute. In our view, the Department should not, at this time, impose its own restrictions on withdrawals, which would dampen both sponsor and participant interest in these accounts.

- **Investment of funds.** DOL should prescribe that cash equivalents, money market funds, and stable value funds are appropriate investment vehicles for PLESA funds.

- **Vesting/Anti-abuse**. Plan sponsors seek guidance as to whether normal vesting rules apply to employer matching PLESA contributions. Further, DOL is requested to clarify whether plan sponsors will have appropriate flexibility to impose "reasonable procedures" to limit potentially abusive contributions designed to maximize matching contributions. For example, a plan sponsor may want to limit matching contributions to the first $2,500 of annual contributions, while others may have other restrictions depending on the match structure. ERIC recommends permitting maximum flexibility for plan sponsors so that they can design procedures that fit their populations.

- **Disclosures.** Please provide a model notice for the new required disclosure under ERISA section 801(d)(3). The Secretary should use the discretion afforded under section 804 to prescribe simplified reporting procedures, including permitting liberalized use of electronic delivery.

- **Fees.** DOL should clarify that a reasonable fee can be charged for maintenance and administration of the PLESA; and that the fee can be charged either to the universe of participants of the underlying retirement plan or solely to the PLESA participants.

- **Coordination with a plan's general auto-enrollment framework.** DOL and Treasury should provide guidance on whether a PLESA auto-enrollment election must be separate, or how they interact with other automatic plan contributions. For example, if a plan automatically enrolls an employee to contribute a certain percentage of income, do automatic PLESA contributions count toward that rate, offsetting retirement contributions?

- **Termination**. Section 801(c)(2)(B) states that a plan sponsor may terminate a PLESA feature at any time. The Department, perhaps in consultation with the Department of Treasury, should confirm terminating a PLESA feature has no effect on the retirement portion of the plan.

Defined Contribution Plan Fee Disclosure Changes Should Focus on Clarity and Flexibility

SECURE 2.0 requires the Department to review its regulations relating to participant-directed individual account plans under 29 CFR section 2550.404a-5. The Department is required to submit a report to Congress on its findings within three years, including recommendations for

legislative changes. Even prior to enactment of SECURE 2.0, DOL had made clear that the content and design of participant disclosures generally has been a priority for the Department independently, including through public statements.

ERIC members are, of course, committed to providing participants with useful information while complying with their legal obligations to provide required disclosures. In that regard, they have learned that participants value simplicity and clarity in disclosures. As a preliminary matter, ERIC would be skeptical of adding additional content to these disclosures, which could serve to confuse participants, make the disclosures more complex, and increase administrative burdens. It seems unlikely that disclosures are insufficiently voluminous currently, and so focus groups or other independent research should be conducted if the Department is determined to alter its regulations.

Additionally, if the Department does propose increasing requirements, the suggested changes would need to be designed to address measurable defects in current disclosure rules, not the overall current state of financial literacy or wellness. Large employers work hard to help employees achieve financial security, but fulsome disclosure alone cannot meet that goal.

At the same time, plans should have sufficient flexibility to deliver the required information in language and format appropriate for their workforces, consistent with fiduciary obligations. For example, the Department could consider permitting disclosure of total annual operating expenses net of waivers and reimbursements, which may provide a more complete picture of operating expenses. Interactive educational materials also play a key role, and use of technology should be encouraged. Therefore, the Department should recommend that Congress re-permit the default electronic delivery of all required disclosures in order to increase both efficiency and engagement.

DOL Should Not Add Requirements to New Paper Statements Mandates

One of the most controversial provisions of SECURE 2.0 was Section 338, which made it harder for plans to use default electronic delivery of certain disclosures required by ERISA. Under the law, beginning in plan years that begin after December 31, 2025, a plan may furnish an individual account plan's annual pension benefit statement either (a) in accordance with the strictures of the 2002 electronic delivery safe harbor[1] or (b) by paper delivery, unless the participant requests electronic delivery and the plan permits it. Defined benefit plan participants are subject to the same rule, except only every three years.

ERIC had significant concerns regarding Section 338 of SECURE 2.0. Nevertheless, we recognize that the Department is now obliged to implement the law. In doing so, the Department should recognize that this provision was heavily negotiated by members of Congress. Had Congress intended to add additional requirements, they would have. Therefore, in our view, the 2002 Safe Harbor should not be modified beyond what's necessary to conform with the statute.

[1] 29 CFR 2520.104b–1(c).

The new one-time paper statement should only be required before electronically furnishing pension benefit statements under the 2002 Safe Harbor to retirement plan participants who first become eligible to participate (and beneficiaries who first become eligible for benefits) after December 31, 2025.

Additionally, it would be inappropriate to modify either the regulations by conditioning the use of electronic delivery on “access in fact.” The applicable disclosure requirements should not impose burdens on plan sponsors if participants choose not to engage with the electronic disclosures provided pursuant to regulations. Had Congress intended to impose the requirement that plan administrators monitor who actually accesses and downloads electronic disclosures, that would have been added to the legislation. Additionally, it is unclear whether the Department would also impose “access in fact” burdens on paper disclosures, which may be less accessible, more likely to be immediately physically discarded, and potentially less physically secure.

Furthermore, the 2002 Safe Harbor also applies to disclosures by health and welfare plans. Changing the Safe Harbor in this way would have broader implications than just retirement plans. Rather than inventing new requirements, the Department should carefully implement what Congress passed.

Balanced Lump Sum Offer Disclosure Should Track Legal Requirements

New Section 113 of ERISA imposes notice and reporting requirements on plans offering participants and beneficiaries the ability to receive a lump sum payment in lieu of future monthly payments. The notice to participants is required to include:

‘‘(A) Available benefit options, including the estimated monthly benefit that the participant or beneficiary would receive at normal retirement age, whether there is a subsidized early retirement option or qualified joint and survivor annuity that is fully subsidized (in accordance with section 417(a)(5) of the Internal Revenue Code of 1986, the monthly benefit amount if payments begin immediately, and the lump sum amount available if the participant or beneficiary takes the option.

‘‘(B) An explanation of how the lump sum was calculated, including the interest rate, mortality assumptions, and whether any additional plan benefits were included in the lump sum, such as early retirement subsidies.

‘‘(C) In a manner consistent with the manner in which a written explanation is required to be given under 417(a)(3) of the Internal Revenue Code of 1986, the relative value of the lump sum option for a terminated vested participant compared to the value of— ‘‘(i) the single life annuity, (or other standard form of benefit); and ‘‘(ii) the qualified joint and survivor annuity (as defined in section 205(d)(1));

‘‘(D) A statement that — ‘‘(i) a commercial annuity comparable to the annuity available from the plan may cost more than the amount of the lump sum amount, and ‘‘(ii) it may be advisable to consult an advisor regarding this point if the participant or beneficiary is considering purchasing a commercial annuity.

‘‘(E) The potential ramifications of accepting the lump sum, including longevity risks, loss of protections guaranteed by the Pension Benefit Guaranty Corporation (with an explanation of the monthly benefit amount that would be protected by the Pension Benefit Guaranty Corporation if the plan is terminated with insufficient assets to pay benefits), loss of protection from creditors, loss of spousal protections, and other protections under this Act that would be lost.

‘‘(F) General tax rules related to accepting a lump sum, including rollover options and early distribution penalties with a disclaimer that the plan does not provide tax, legal, or accounting advice, and a suggestion that participants and beneficiaries consult with their own tax, legal, and accounting advisors before determining whether to accept the offer.

‘‘(G) How to accept or reject the offer, the deadline for response, and whether a spouse is required to consent to the election.

‘‘(H) Contact information for the point of contact at the plan administrator for participants and beneficiaries to get more information or ask questions about the options.

Most pointedly, ERISA section 113(b)(1)(E) lists specific examples of the “potential ramifications” of accepting the lump sum:

- longevity risks
- loss of protections guaranteed by the Pension Benefit Guaranty Corporation
- loss of protection from creditors
- loss of spousal protections
- and other protections under this Act that would be lost.

The Department asks what other “potential ramifications of accepting the lump sum” should be incorporated into the regulations. The Department should not add new mandatory factors into the model notice. However, it should provide plans the flexibility to provide additional information, if appropriate for their participants.

For example, there are, of course, other consequences of accepting a lump sum offer. Some may be positive, on a case-by-case basis. For example, the participant or beneficiary may be able to invest the lump sum proceeds in a way that generates better returns than the pension payments. The participant would also be assured of the ability to create a longer lasting legacy, passing down the benefit beyond immediate beneficiaries in the case of death. And, while the participant certainly would lose the protection of the PBGC insurance program, it’s also true that the participant would no longer be subject to potential cuts as a result of the operation of that program’s guarantee limits, should the plan terminate with insufficient assets to pay benefits. It is fully appropriate for the Department to permit employers to present both positive and negative considerations in connection with lump sum offers.

The Department also asks whether the list of potential ramifications under the new notice should reflect factors such as “*transactional complexity, aging and cognitive decline, and financial literacy*” in order to achieve “*better decisions and retirement outcomes*.” In our view, each participant or beneficiary will have an individualized calculus when evaluating a lump sum offer.

While the Department has asked whether cognitive decline and relative financial literacy are relevant, other factors are also important, such as immediate consumption needs or investment opportunities, risk tolerance, alternative streams of income (including Social Security), and other preferences. Therefore, the Department should be very reticent to define "better decisions and retirement outcomes." Instead, pursuant to the statute, the Department should endeavor to ensure that plan participants have accessible, relevant, and balanced information presented in a manner calculated for it to be understood.

ERIC supports the creation of a model notice to help plans comply with these new requirements, but that notice should include only those items from the statute. Therefore, the Department should not adopt the model notice in Appendix B, which skews strongly towards a recommendation to keep the pension payment instead of a lump sum. For example, some of the questions and answers presented start with the premise that the participant will take the lump sum and purchase a retail annuity (it is unclear how common this is) or otherwise invest to achieve an annuity-like stream of payments. More attention should be paid to the possibility that the lump sum proceeds will instead be invested in a target date fund, real estate, or other investment strategies. The "common questions" chart also does not address the possibility that the market could rise (not just fall) and that a pension plan could be terminated.

Finally, the Department asks about the new reporting requirements to the DOL and the PBGC. In particular, new section 113 of ERISA permits DOL to require plans to furnish the number of participants who accepted the lump sum offer and "such other information as the Department may require" in a post-election report required of plans offering a lump sum window to participants. In our view, the Department should not require any additional information from the plan other than that specifically mandated by the statute. Demographic or other granular information about participant elections is of limited practical utility and would introduce unneeded recordkeeping and administrative complexity.

Conclusion

In this RFI, the Department has posed initial inquiries about many disparate items and requested responses in a relatively tight timeframe. As the regulatory process continues on each of these items, we look forward to providing additional information and context to assist employers, workers, and retirees achieve positive and workable outcomes.

Sincerely,

Andy Banducci