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DOL issues RFI on SECURE 2.0 Reporting and Disclosure Provisions

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TO: ICI Members
Pension Committee
Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL issues RFI on SECURE 2.0 Reporting and Disclosure Provisions

On August 11, 2023, the Department of Labor (DOL) released a new request for information (RFI)[1] on provisions of the SECURE 2.0 Act[2] that impact ERISA's reporting and disclosure requirements. The RFI includes 31 questions designed to solicit public feedback and begin developing a public record for several provisions from SECURE 2.0. DOL notes that "[t]his feedback will inform more specific, detailed rulemaking or other guidance on such provisions in the future," and that it will continue to consult with other agencies, including the Treasury Department. Comments on the RFI are due on October 10, 2023.

Following is an overview of the RFI, including the SECURE 2.0 provisions to which it relates:

- Pooled employer plan modification (§105) and report on pooled employer plans (§344). Section 105 of SECURE 2.0 modifies the requirements applicable to a pooled employer plan (PEP), effective for plan years after 2022, requiring that (1) the plan designate a named fiduciary (other than an employer in the plan) to be responsible for collecting contributions to the plan and (2) such fiduciary implement written contribution collection procedures that are reasonable, diligent and systematic. The RFI notes that DOL "intends to update the Form PR and Instructions (Registration for Pooled Plan Provider), as necessary, to reflect this amendment for purposes of reporting the designated named fiduciary." Section 344 of SECURE 2.0 requires DOL to conduct a study on PEPs, including their impact on coverage, and provide a report to Congress within 5 years of enactment and every 5 years thereafter.[3] The report should make recommendations on how PEPs can be improved to serve and protect participants. The RFI explains that DOL anticipates using data collected from the Form PR and the Form 5500 in preparing this report. DOL "is requesting commenters' ideas about how to construct such a study effectively in response to this directive and whether, and what, additional information the Department should focus on to help achieve the stated objectives of the study to improve PEPs and subsequent reports to Congress." Questions 1 through 6 of the RFI include more specific questions focusing on these

two provisions. The topics of the RFI questions generally follow SECURE 2.0's specific requirements for DOL's study. The study must address:

- the legal name and number of pooled employer plans;
- the number of participants in such plans;
- the range of investment options provided in such plans;[4]
- the fees assessed in such plans;
- the manner in which employers select and monitor such plans;
- the disclosures provided to participants in such plans;
- the number and nature of any enforcement actions by [DOL] on such plans;
- the extent to which such plans have increased retirement savings coverage in the United States; and
- any additional information as [DOL] determines is necessary.[5]

- Emergency savings accounts linked to individual account plans (§127). Section 127 of SECURE 2.0 creates, effective for plan years beginning after December 31, 2023, a new "pension-linked emergency savings account" (PLESA) that employers may offer to non-highly compensated employees as part of a DC plan.[6] The provision requires certain notices and disclosures to participants, including an initial and annual notice.[7] DOL summarizes the information that must be included in the notices as follows:

- the purpose of PLESAs;
- limits on and tax treatment of, contributions to a PLESA;
- any fees, expenses, restrictions, or charges associated with PLESAs;
- procedures for electing to make or opting out of PLESA contributions, changing contribution rates, and making participant withdrawals;
- the amount of the PLESA account and the amount or percentage of compensation a participant has contributed to the PLESA;
- the designated investment option for PLESA contributions;
- options for the PLESA account balance after termination of employment or of the PLESA by the plan sponsor; and
- other information.[8]

The provision also grants DOL the "authority to prescribe an alternative method for satisfying any reporting and disclosure requirement under ERISA with respect to PLESAs." It also amends ERISA section 404(c) with respect to specified default investment arrangements for PLESAs. Questions 7 and 8 include broad questions on this provision regarding what guidance is needed and whether a model notice or model language would be useful.

- Performance benchmarks for asset allocation funds (§318). No later than two years after enactment, Section 318 of SECURE 2.0 directs DOL to update its participant-level fee disclosure regulation—specifically, the requirement to compare each designated investment alternative against an appropriate broad-based securities market index. The change allows investments such as target date funds, that include a mix of asset classes, to be benchmarked against a blend of broad-based securities market indices, provided certain conditions are met. SECURE 2.0 requires DOL to report to Congress on the utilization and participants' understanding of the new benchmarking requirements no later than three years after the applicability date of updated regulations required by this provision. Questions 9 and 10 relate to this provision, including whether there are additional factors beyond the criteria in SECURE 2.0 that should be used by plan administrators. DOL encourages commenters to compare

DOL's prior guidance on the use of blended performance benchmarks,[9] which is similar but not identical to the criteria in SECURE 2.0.

- Defined contribution plan fee disclosure improvements (§340). Within three years of enactment, Section 340 of SECURE 2.0 requires that DOL review its fee disclosure regulation for participant-directed individual account plans (see 29 CFR 2550.404a-5) and explore how the contents and design of the disclosures under this regulation may be improved to enhance participants' understanding of defined contribution plan fees and expenses, including the cumulative effect of such fees on retirement savings over time. The provision requires DOL to report to Congress on the findings and recommendations for legislative changes to address the findings. In the RFI, DOL notes that while it anticipates that the RFI responses "will be a helpful start" it "may take steps in addition to this RFI to conduct its review of the regulation." Questions 11 through 13 include several general questions regarding the content and design of the notice. In Question 11, DOL seems to acknowledge that issues related to participant's knowledge may relate more generally to a lack of financial literacy rather than deficiencies in the notice requirements.[10] DOL asks for input regarding its model comparative chart for §2550.404a-5 disclosures, which is included as Appendix A.
- Eliminating unnecessary plan requirements related to unenrolled participants (§320). Section 320 of SECURE 2.0 modifies the notice requirements under ERISA and the Internal Revenue Code (IRC), effective for plan years beginning after December 31, 2022, to provide that individual account plans are not required to provide certain notices to employees who are eligible to participate but have not enrolled in the plan. The plan must provide such employees with notices required in connection with the employee's initial eligibility under the plan (including the summary plan description), an annual notice reminding the employee that he or she is eligible to participate in the plan and any applicable election deadlines, and other documents upon the participant's request. Questions 14 through 18 relate to this provision, including whether there are additional criteria that should be considered for determining who is an unenrolled participant and whether additional information should be required on the annual reminder notice to unenrolled participants. DOL also asks whether model language would be useful and feasible (given the variability among plans regarding the relevant plan provisions).
- Requirement to provide paper statements in certain cases (§338). Effective for plan years beginning after December 31, 2025, for DC plans, Section 338 of SECURE 2.0 requires that each year, one participant benefit statement must be provided in paper (one every three years, for defined benefit plans[11]). There are two exceptions to this requirement: (1) where a participant has affirmatively opted into electronic delivery and (2) where the plan is providing electronic delivery under the 2002 safe harbor (i.e., participants for whom access to the employer's or plan sponsor's electronic information system is an integral part of their duties as employees). For these exceptions to apply, with respect to participants who first become eligible to participate and beneficiaries who first become eligible for benefits after December 31, 2025, a plan must first send the participant a one-time notice on paper explaining the participant's right to request all documents in paper. The provision also directs DOL update its guidance no later than December 31, 2024, to impose new requirements for plans using electronic delivery under a method other than the 2002 safe harbor—this appears intended to modify DOL's more recent e-delivery safe harbor finalized in May 2020.[12] As described by DOL, the 2020 safe harbor must be updated as necessary to ensure that:

- participants and beneficiaries are permitted the opportunity to request that any

disclosure required to be delivered on paper under such guidance shall be furnished electronically;
- each paper statement furnished pursuant to such updated guidance includes an explanation of how to request that all such statements, and any other documents required to be disclosed under ERISA, be furnished electronically and contact information for the plan sponsor, including a telephone number;
- the plan may not charge any fee to a participant or beneficiary for delivery of any paper statements;
- each required document that is furnished electronically by such plan shall include an explanation of how to request that all such documents be furnished on paper in written form; and
- a plan is permitted to furnish a duplicate electronic statement in any case when the plan furnishes a paper pension benefit statement.[13]

Questions 19 through 21 focus on implementation of this provision, including how the 2002 and 2020 safe harbors should be amended. DOL asks, for example, whether the 2002 safe harbor should be modified to include an initial paper notice that resembles the initial paper notice required under the 2020 safe harbor. In Question 21, DOL asks whether both safe harbors should be modified such that their continued use by plans is conditioned on access in fact, and whether the safe harbors should require that plan administrators revert to paper disclosures or take some other action in the case of individuals who plan administrators know have not accessed the plan's website.

- Consolidation of defined contribution plan notices (§341). Not later than two years after enactment, Section 341 of SECURE 2.0 requires DOL and Treasury to adopt regulations permitting a DC plan to consolidate two or more of the following notices required under ERISA and the IRC: qualified default investment alternative (QDIA) notice, automatic contribution arrangement notice, 401(k) safe harbor plan notice, qualified automatic contribution arrangement notice, and permissive withdrawal notice. Question 22 focuses on this provision.[14]
- Information needed for financial options risk mitigation act (§342). Section 342 of SECURE 2.0 directs DOL to issue regulations requiring defined benefit plans to provide participants with more information on lump-sum buyout windows (including an explanation of the potential ramifications of accepting the lump sum) to enable better comparisons between the lump sum offer and benefits offered under the plan. DOL must issue the regulations not earlier than one year after enactment and must include a model notice. Questions 23 through 28 focus on this provision. In Question 25, DOL asks whether transactional complexity, aging and cognitive decline, and financial literacy are relevant factors DOL should consider when deciding to add to the list of potential ramifications, noting that "[s]ome 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." In Question 27, DOL asks for input on the model notice on Financial Options Risk Mitigation developed by the ERISA Advisory Council in 2015, which is included as Appendix B.
- Defined benefit annual funding notices (§343). Effective for plan years beginning after December 31, 2023, Section 343 of SECURE 2.0 makes several changes to defined benefit plan annual funding notices to require more detailed information on a plan's funding status. Questions 29 through 31 focus on this provision. In Question 31, DOL asks for input on how to modify its Annual Funding Notice Model Language, which is included as Appendix C.

DOL also notes that the RFI does not cover the following three provisions of SECURE 2.0 that affect the reporting and disclosure framework of ERISA:

- Review and report to Congress relating to reporting and disclosure requirements (§319). Most significantly, this RFI does not cover Section 319 of SECURE 2.0, which directs DOL, Treasury, and the Pension Benefit Guaranty Corporation (PBGC) to review the reporting and disclosure requirements in ERISA and the IRC applicable to pension and retirement plans and, within three years, to provide a joint report to Congress with recommendations to "consolidate, simplify, standardize, and improve" the requirements. Noting the expansive nature of this review, and the involvement of the other agencies, DOL explains that it "currently intends to move forward by formally soliciting public input on the section 319 project, in coordination with the Treasury Department and PBGC, but as part of a rulemaking initiative separate from this RFI."[15]
- Annual audits for group of plans (§345). Section 345 of SECURE 2.0 amended the audit requirements relating to consolidated filing of Form 5500 for groups of similar DC plans, to allow small plans within the consolidated filing group to continue to be exempted from the independent audit requirement. These changes were implemented through a recent rulemaking relating to annual reporting requirements under ERISA. This provision was addressed by the final changes to the Form 5500 released in February.[16]
- Expansion of Employee Plans Compliance Resolution System (§305). Section 305 of SECURE 2.0 expanded the IRS's EPCRS to allow plans to self-correct inadvertent plan violations.[17] In the case of self-correction of inadvertent plan loan errors, SECURE 2.0 provided that DOL should treat the correction as meeting the requirements of its Voluntary Fiduciary Correction Program (VFCP), but noted that DOL may impose reporting or procedural requirements. In February, DOL reopened the comment period for the proposed updates to its VFCP to allow commenters to address issues raised by this SECURE 2.0 provision.[18]

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Notes

[1] The RFI was published at 88 Fed. Reg. 54511 (August 11, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-08-11/pdf/2023-17249.pdf.

[2] For a summary of the SECURE 2.0 Act, see ICI Memorandum No. 34795, dated January 12, 2023, available at https://www.ici.org/memo34795.

[3] Note that DOL has an item (listed as being in the pre-rule stage) on its current regulatory agenda on Pooled Employer Plans, indicating that the project will take into account Section 344 of SECURE 2.0. For an overview of DOL's regulatory agenda, see ICI Memorandum No. 35358, dated June 26, 2023, available at https://www.ici.org/memo35358.

[4] In Question 3, DOL provides helpful commentary regarding brokerage windows, noting that it interprets "investment options provided in such plan" to mean "the specific

investment options the responsible plan fiduciary has selected as 'designated investment alternatives' under the plan" and not "the potentially large range of investments available through a brokerage window or similar arrangement, to the extent offered in a PEP."

[5] Paragraphs (1)(A) through (I) of Section 344 of SECURE 2.0. Also see footnote 3 of the RFI.

[6] The employer may automatically enroll such employees into the account at no more than 3 percent of compensation and there is a cap of $2,500 (indexed) on the amount of contributions. Contributions to the account are treated as Roth contributions, but there is no holding period or other requirement for qualified (tax free) distributions (plans must permit at least one withdrawal per month). Contributions are treated as elective deferrals for purposes of employer matching contributions, which will be made into the retirement plan account, with an annual cap of $2,500. No employer contributions are permitted into the emergency savings account. Funds in the emergency savings account must be invested in cash or a principal preservation product. The first four withdrawals from the account each plan year may not be subject to any fees or charges solely on the basis of such withdrawals. At separation from service, employees may take their emergency savings accounts as cash or roll the balance into a Roth account in the same plan or to a Roth IRA.

[7] Note that DOL has an item (listed as being in the pre-rule stage) on its current regulatory agenda entitled "Emergency Savings Accounts Linked to Individual Account Plans," which is intended to implement Section 127 of SECURE 2.0. For an overview of DOL's regulatory agenda, see ICI Memorandum No. 35358, dated June 26, 2023, available at https://www.ici.org/memo35358.

[8] DOL's list generally follows the language of Section 127 of the SECURE 2.0 Act, in new ERISA section 801(d)(3)(A)(i) through (ix). The SECURE 2.0 Act also included:

(v) as applicable, the amount of the intended contribution to such [PLESA] or the change in the percentage of the compensation of the participant of such contribution; and

(ix) the ability of a participant who becomes a highly compensated employee [to] withdraw any account balance from a [PLESA] and the restriction on the ability of such a participant to make further contributions to the [PLESA].

[9] In Question 16 of Field Assistance Bulletin 2012-02, DOL states that a plan administrator may use the target asset allocation of the designated investment alternative (DIA) to determine the weightings of the indexes used to create the additional blended benchmark, as long as the target is representative of the actual holdings of the DIA over a reasonable period of time. The reasonableness of the time period depends on facts and circumstances, but a period that is the same as that covered by the benchmark returns (e.g., 1-, 5-, or 10-years) would not be unreasonable, according to the guidance. In addition, whether the target allocation is representative of the actual holdings of the DIA depends on facts and circumstances, but target percentages ordinarily would be representative of the actual holdings if "nearly equal" to the daily average of the DIA's ratios of stocks and bonds over a reasonable period of time. See ICI Memorandum No. 26153, dated May 11, 2012, available at https://www.ici.org/memo26153. Field Assistance Bulletin No. 2012-02R is available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2012-02r. DOL also refers to language in the preamble to its final rule on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans. See 75 Fed. Reg. 64910 (October 20, 2010) at page 64917, available at

https://www.govinfo.gov/content/pkg/FR-2010-10-20/pdf/2010-25725.pdf.

[10] DOL asks: How is the information adequate or inadequate in helping plan participants make informed investment decisions? If inadequate, is there evidence that this inadequacy is tied directly to the subject regulation as opposed to other exogenous factors impacting financial literacy?

[11] In footnote 7, DOL seems to confirm that DB plans may continue to use the alternative notice provision in section 105(a)(3) of ERISA, which, in relevant part, provides that plan administrators of DB plans shall be treated as meeting the requirements of ERISA section 105(a)(1)(B)(i) "if at least once each year the administrator provides to the participant notice of the availability of the pension benefit statement and the ways in which the participant may obtain such statement." Section 105(a)(2) of ERISA which specifies how the pension benefit statements required by Section 105(a)(1)(B) must be delivered, was amended by SECURE 2.0. However, Section 105(a)(1)(B) of ERISA, which requires DB plans to deliver a pension benefit statement to participants once every three years and Section 105(a)(3), which includes the alternative notice provisions, were not amended by SECURE 2.0.

[12] For a description of the safe harbor for electronic delivery of ERISA disclosures that DOL adopted in 2020, see ICI Memorandum No. 32478, dated May 21, 2020, available at https://www.ici.org/my_ici/memorandum/memo32478.

[13] These requirements are generally the same as those listed in paragraphs (b)(2)(A) through (E) of Section 338 of SECURE 2.0.

[14] Note that in 2017 ICI sent a letter to the ERISA Advisory Council on the topic "Mandated Disclosure for Retirement Plans—Enhancing Effectiveness for Participants and Sponsors." The letter included several suggestions for consolidating notices. See ICI Memorandum No. 30844, dated August 18, 2017, available at https://www.ici.org/memo30844.

[15] As a reminder, DOL has an item on its current regulatory agenda, listed as being in the pre-rule stage, entitled "Improving Participant Engagement and Effectiveness of ERISA Retirement Plan Disclosures." For that project, "[c]onsistent with section 319 of SECURE Act 2.0," DOL intends "to explore ways to improve the effectiveness of retirement plan disclosures required under [ERISA], balanced with the cost to plans and plan participants and beneficiaries of providing such disclosures." For an overview of DOL's regulatory agenda, see ICI Memorandum No. 35358, dated June 26, 2023, available at https://www.ici.org/memo35358.

[16] For an overview of the final changes to the Form 5500, see ICI Memorandum No. 35212, dated March 23, 2023, available at https://www.ici.org/memo35212.

[17] For an overview of the interim guidance on EPCRS regarding SECURE 2.0 that IRS issued in May, see ICI Memorandum No. 35377, dated July 18, 2023, available at https://www.ici.org/memo35377.

[18] For a summary of DOL's announcement reopening the comment period on the VFCP proposal, see ICI Memorandum No. 34958, dated February 15, 2023, available at https://www.ici.org/memo34958.