The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

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October 10, 2023

ICI Submits Response to DOL's 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: ICI Submits Response to DOL's RFI on SECURE 2.0 Reporting and Disclosure Provisions

On October 10, 2023, ICI submitted the attached letter to the Department of Labor (DOL) in response to the request for information (RFI)[1] DOL issued on various provisions of the SECURE 2.0 Act that impact ERISA's reporting and disclosure requirements.[2] The RFI includes 31 questions designed to solicit public feedback and begin developing a public record for the selected SECURE 2.0 Act provisions.

Our response to the RFI addresses the following points.

Requirement to Provide Paper Statements in Certain Cases

Section 338 of the SECURE 2.0 Act requires that each year, one of the four quarterly participant benefit statements must be provided in paper. This one-paper-statement-per-year requirement does not apply to participants in plans using DOL's 2002 safe harbor for electronic delivery ("2002 Safe Harbor")[3] as long as the plan first sends the participants a one-time notice on paper explaining the participants' right to request all documents in paper.[4] In addition, the SECURE 2.0 Act directs DOL to ensure that its 2020 electronic delivery safe harbor ("2020 Safe Harbor")[5] meets several specific conditions.

ICI's letter argues that DOL should not modify the 2002 Safe Harbor beyond the narrow change specifically mandated by section 338 of the SECURE 2.0 Act because the safe harbor has proven effective for participants for over 20 years. Similarly, changes to the 2020 Safe Harbor are not needed because the conditions specified by section 338(b)(2) of the Act duplicate either requirements that are already included in the safe harbor or existing practices. In response to the RFI's question about whether DOL should modify both safe harbors to impose an "access in fact" standard for electronic communications, ICI's letter states that such a standard would impose unreasonably burdensome and prohibitively costly requirements that far exceed those applied to paper communications.

Defined Contribution Plan Fee Disclosure Improvements

Section 340 of the SECURE 2.0 Act directs DOL to review its fee disclosure regulation for participant-directed individual account plans (see 29 CFR 2550.404a-5), explore how the disclosures could be improved to enhance participants' understanding of fees, and report to Congress on the findings and recommendations for legislative changes to address the findings.

ICI's letter explains that the current participant fee disclosure regulation provides participants with the most relevant information for them, enabling appropriate comparisons and informed decisions about participating in a defined contribution plan. To properly assess the effectiveness of these disclosures, DOL should undertake a broader solicitation of views and information beyond this RFI (which has only a 60-day comment period), before proposing any changes to the participant fee disclosure regulation. If DOL identifies areas for improvement, it must propose any changes to the specific regulatory requirements through notice and comment rulemaking, including a thorough cost-benefit analysis of such changes.

Performance Benchmarks for Asset Allocation Funds

Section 318 of the SECURE 2.0 Act 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.

ICI's letter suggests that detailed guidance is not needed to implement this provision. ICI urges DOL, in amending the participant fee disclosure regulation as directed by the Act, to accord discretion to plan administrators as they construct and modify blended benchmarks. Similarly, any disclosure requirements relating to participants' understanding of blended benchmarks should be reasonable and not overly detailed. The letter further suggests that any guidance address the use of third-party blended indexes as the benchmark for asset allocation funds.

Pooled Employer Plans (PEPs)

Section 344 of the SECURE 2.0 Act requires DOL to conduct a study on PEPs, including their impact on coverage, and provide a report to Congress within five years of enactment and every five years thereafter.

ICI's letter recommends that DOL utilize a confidential questionnaire to gather information for its PEP study and report, to the extent such information is not otherwise available to DOL. The letter explains that it is imperative that any non-public proprietary information DOL collects for this study remain confidential, with results disclosed strictly in an aggregated manner. The report should not present any information in a way that would identify specific providers or reveal confidential or proprietary information.

Emergency Savings Accounts Linked to Individual Account Plans

Section 127 of the SECURE 2.0 Act permits employers to offer, as part of a defined contribution plan, a new short term "emergency savings account" to non-highly compensated employees.[6]

ICI's letter explains that plans and plan service providers face significant challenges in

implementing pension linked emergency savings accounts. As such, the letter urges DOL, when drafting applicable guidance, to adopt a flexible approach that recognizes the variety of practical limitations the different plans face due to their service provider frameworks.

Consolidation of Defined Contribution Plan Notices

Section 342 of the SECURE 2.0 Act requires that DOL and Treasury adopt regulations permitting a defined contribution 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.

ICI's letter suggests that any guidance issued pursuant to section 341 of the SECURE 2.0 Act should encourage notice consolidation by addressing liability concerns.

Eliminating Unnecessary Plan Requirements Related to Unenrolled Participants

Section 320 of the SECURE 2.0 Act modifies the notice requirements under ERISA and the Internal Revenue Code 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.[7]

ICI's letter recommends that DOL exercise caution as to any additional requirements that may increase the burden on parties when sending notices to unenrolled participants. Guidance or model notices that would impose additional requirements beyond those that are necessary to effectuate section 320 would frustrate the aim of this section to reduce unnecessary costs of plan administration.

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Notes

[1] For a summary of the RFI, see ICI Memorandum No. 35399 dated August 14, 2023, available at https://www.ici.org/memo35399. 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] Plans can use the 2002 Safe Harbor with respect to two categories of individuals: (1) participants for whom access to the employer's or plan sponsor's electronic information system is an integral part of their duties as employees (i.e., "wired at work"), and (2)

individuals who have affirmatively consented to receive documents electronically.

[4] This exception to the one-paper-statement-per-year also applies where a participant affirmatively elects to receive the statement electronically.

[5] Provided that certain conditions are met, the 2020 Safe Harbor allows retirement plans to shift the default method of delivering participant plan disclosures to electronic delivery, using a "notice and access" structure. For an overview of the 2020 Safe Harbor, see ICI Memorandum No. 32478, dated May 21, 2020, available at https://www.ici.org/my_ici/memorandum/memo32478.

[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] 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.
