October 10, 2023

Submitted via regulations.gov
Office of Regulations and Interpretations
Employee Benefits Security Administration
RIN 1210-AC23
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-AC23) (88 Fed. Reg. 54511, August 11, 2023)

To Whom It May Concern:

This letter responds to the request for public comments on the "Request for Information-SECURE 2.0 Reporting and Disclosure," issued August 11, 2023 ("RFI").

The SHRM mission is to create better workplaces where employers and employees thrive together. As the voice of all things work, workers and the workplace, SHRM is the foremost expert, convener and thought leader on issues impacting today's evolving workplaces. As such, we appreciate the opportunity to provide the Employee Benefits Security Administration of the U.S. Department of Labor ("the Department") with comments on its Request for Information to solicit public feedback and to begin developing a public record for a number of provisions of Division T of the Consolidated Appropriations Act of 2023 ("SECURE 2.0") that impact the reporting and disclosure framework of the Employee Retirement Income Security Act of 1974 ("ERISA"). With nearly 325,000 members in 165 countries, SHRM impacts the lives of more than 235 million workers and families globally. The anticipated flow-through changes to the reporting and disclosure obligations under SECURE 2.0 have the potential to significantly burden SHRM member organizations.

A. Pooled Employer Plans

Q-1: *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?*

Q-2: *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?*

Q-3: *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?*

Q-4: *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 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?*

Q-5: *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?

Q-6: *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?*

Q-1 – Q-6 General Comments: We appreciate and support the Department's efforts not only to consider additional guidance but also to gather additional information on PEPs, as their introduction under SECURE 1.0 is still relatively new. We believe that both the revised definition in Section 3(43)(B)(ii) of ERISA and the reporting obligations on Form PR need no further clarification or guidance at this time. These plans have the potential to make the provision of retirement benefits by smaller and medium-sized companies easier, and we follow developments with interest.

B. Emergency Savings Accounts Linked to Individual Account Plans

Q-7: *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.*

Q-7 Comment: SHRM requests that the Department make efforts to simplify the guidance and implement broader protections to encourage plan sponsors to offer pension-linked emergency savings accounts ("PLESAs").

Currently, Section 127 of SECURE 2.0 requires PLESA earnings to be included in the $2,500 account limit. Market fluctuations cause changes on virtually a daily basis, and the moving target renders administration of PLESAs unnecessarily difficult. SHRM suggests, similar to annual deferral limitations under Internal Revenue Code Section 402(g), basing the $2,500 maximum only on Roth deferrals and excluding earnings from the equation.

In addition, while Section 127 of SECURE 2.0 also amended Section 404(c) of ERISA with respect to specified default investment arrangements for PLESAs, there is currently no fiduciary safe harbor for selection of such investment arrangements. This relief would be an important consideration for SHRM members in deciding whether to offer PLESAs in their plans.

Q-8: *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.*

Q-8 Comments: SHRM believes that its members, along with other plan sponsors who are evaluating whether to offer PLESAs, would benefit from a model notice and would view it as an incentivizing factor toward offering PLESAs. As there is significant required content under Section 801 of ERISA, a model notice eliminates much uncertainty over potential ambiguity in language.

C. Performance Benchmarks for Asset Allocation Funds

Q-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.

Q-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.*

Q-9 and Q-10 General Comments: We believe that benchmarking is the most effective way for fiduciaries to select and monitor and for participants to understand mixed asset class funds. Likewise, we believe that optional surveys to participants receiving such disclosures would be one effective way to make the assessments required under Section 318 of SECURE 2.0. These optional surveys, for example, could be incorporated as part of the Department's plan investigations.

D. Defined Contribution Plan Fee Disclosure Improvements

Q-11: *What information, including information required by the subject regulation, is currently being provided to participants in participant directed individual account plans to provide them with information about their plans' fees and expenses and the cumulative effect of fees and expenses on their retirement savings over time? 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?*

Q-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? 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 these improvements be incorporated into the subject regulation?

Q-13: *The subject regulation requires that investment fee and performance information for each designated investment alternative under the plan must be furnished in a chart or similar format that is designed to facilitate a comparison of such information. Is the Department's model comparative chart, attached to this RFI as Appendix A, helpful to participants in facilitating a meaningful comparative analysis and selecting among investment options and for plan administrators in satisfying their disclosure obligations under the regulation? If not, how could the model be modified to enhance its effectiveness? Are there examples of disclosures provided to satisfy the subject regulation that use formats or designs that differ from the Department's model comparative chart that have proven to be more effective?*

Q-11 – Q-13 General Comments: SHRM members are concerned with the overall complexity of these disclosures and the difficulty that many have in attempting to understand the information conveyed. Another concern is that participants may select investments based solely on cost/expense because of these disclosures. We encourage the Department to attempt further simplification of the model comparative chart.

E. Eliminating Unnecessary Plan Requirements Related to Unenrolled Participants

Q-14: *Is there any guidance, regulatory or otherwise, that plan administrators need or would find helpful to implement ERISA section 111?*

Q-14 Comment: We believe it would be beneficial for the Department to clarify what the correction process is for failing to timely furnish such notice and when such notice is defective in terms of incorrect or missing information. To that end, we encourage the Department to announce a transition period for implementation, during which time no enforcement action will be taken provided there is a good faith attempt to comply.

Q-15: *Are there additional criteria that the Department, in consultation with the Treasury Department, should consider for determining who is an unenrolled participant?*

Q-15 Comment: The purpose of Section 320 of SECURE 2.0 is of course to reduce the volume of unnecessary communications to participants. We encourage the Department to provide clarifying guidance interpreting the definition of "unenrolled participant" under Section 111(b) of ERISA broadly. Specifically, we suggest interpreting "is not participating in such plan" under Section 111(b)(3) of ERISA to include those participants who have never made salary deferrals into the plan and those that have received only employer contributions to the plan (with the exception of money purchase pension plans).

Q-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?*

Q-16 Comment: We encourage the Department to consider also including a statement encouraging participants to enroll in electronic delivery. The significant cost of paper delivery and administration is well-documented.

Q-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?*

Q-17 Comment: We believe that our members, along with other plan sponsors, would benefit from a model notice. Understanding that the Department will receive many comments, we encourage the Department to strongly consider the benefits of a shorter, simpler notice that unenrolled participants are much more likely to read and understand versus a lengthier notice with more content.

Q-18*: Is there a reliable source of data to estimate the number of people that may be impacted by section 111 of ERISA?*

Q-18 Comment: Most recordkeepers and/or third-party administrators will be keeping track of this information on behalf of plans. We suggest adding a question to the

Form 5500 for the number of unenrolled participant notices issued for the applicable plan year.

F. Requirement to Provide Paper Statements in Certain Cases

Q-19: *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?*

Q-20: *What modifications or updates to the 2020 safe harbor are needed to implement section 338 of SECURE 2.0? Commenters are encouraged to consider and compare the contents of the initial paper notification required under paragraph (g) of the 2020 safe harbor with the content requirements of section 338(b)(2)(B) of SECURE 2.0. To what extent should a statement under ERISA section 105(a)(2) contain the content of the initial paper notification described in paragraph (g) of the 2020 safe harbor, and why?*

Q-19 and Q-20 General Comments: We believe that aligning the 2002 and 2020 safe harbors on initial paper notice requirements would be helpful. In addition, we encourage the Department to work with the Internal Revenue Service and Treasury Department to create a single, uniform safe harbor methodology for electronic delivery.

Question 21: *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?

Q-21 Comment: While we believe verifying access in fact is good policy, it would in practice create yet another administrative burden on plan sponsors that could have the dubious countereffect of discouraging efforts to move to electronic delivery.

G. Consolidation of Defined Contribution Plan Notices

Q-22: *To what extent are regulations needed for plan administrators to consolidate the notices described in section 341 of SECURE 2.0? What are the perceived legal impediments to consolidation under current law and regulations? What are the perceived administrative or other practical impediments to consolidation? What are the benefits and drawbacks to plans of consolidating the notices described in section 341 of SECURE 2.0? Similarly, what are the benefits and drawbacks to plan participants and beneficiaries of consolidating these notices? Other than plans and plan participants, are there other stakeholders that have an interest in this topic? If so, who and what are their interests?*

Q-22 Comment: We suggest that the Department consider allowing <u>all</u> plan notices to be combined whenever possible. This would have the significant impact of reducing administrative burdens with the added benefit to participants that most, if not all, of their retirement-plan-related notices are delivered together rather than piecemeal. Of course, current laws and regulations must be amended to accommodate this change, but the benefit to plan sponsors and participants far outweighs those hurdles. Apart from plans and plan participants, recordkeepers and third-party administrators, who are generally hired to comply with notice requirements on behalf of plans and plan sponsors, will be very interested.

H. Information Needed for Financial Options Risk Management

Q-23: *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.*

Q-23 Comment: In light of the fact that the Department is required to issue a model notice under Section 113(b)(3) of ERISA that addresses the content requirements, we do not see the need for additional guidance at this time.

Q-24: *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?*

Q-25: *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?*

Q-26: *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?*

Q-27: *The Department must issue a model notice for plan administrators to use in discharging their new statutory disclosure obligations under section 113 of ERISA. Commenters are encouraged to submit for the Department's consideration exemplary samples of notices that plan administrators have used in prior lump sum offers that comprehensively explain the consequences of electing a lump sum in lieu of annuity payments for life. Commenters should include a concise explanation of why the*

commenter believes that the sample was effective in conveying meaningful information to participants and beneficiaries. The Department, in turn, offers for consideration by commenters a model notice developed in 2015 by the ERISA Advisory Council. The Council's model is the product of careful deliberation following the receipt of extensive public input from a broad array of stakeholders. The model is attached as Appendix B to this RFI. Should the Department consider using this model as the starting point for the model required under section 113 of ERISA, and if not, why? If so, to what extent could and should this model be improved, for example, to conform to specific requirements under section 113 that were not considered by the ERISA Advisory Council?

Q-24 – Q-27 General Comments: While we believe that adding other potential ramifications may be helpful to participants considering lump sums in lieu of annuities, especially financial literacy relevant factors, our members are already concerned with participants disregarding plan-related notices in general. Thus, we encourage the Department to consider the potential negative effect of significantly lengthening an already long notice (nearly six pages in the RFI) and whether that could cause participants who need to understand the ramifications the most to disregard those warnings.

Q-28: *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.

Q-28 Comment: The pre- and post-election reporting requirements are already creating a significant administrative burden. If the Department chooses to require additional reporting, we encourage the Department to limit such information to that which is readily accessible by the plan sponsor as part of the lump sum window process.

I. Defined Benefit Annual Funding Notices

Q-29: *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.*

Q-30: *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.*

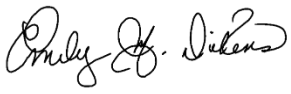
Q-31: *Existing regulations under section 101(f) of ERISA contain a model notice for single-employer defined benefit plans. The Department is interested in suggestions and comments on how to modify the model to reflect the amendments to section 101(f) of ERISA by SECURE 2.0, and for improvements more generally. For ease of reference, the model is attached to this RFI as Appendix C.*

Q-29 – Q-31 General Comments: While most of the changes under Section 343 of SECURE 2.0 requiring additional information concerning funding status need no further clarifications, unnecessarily including two different funding percentages for the same plan is likely to confuse participants. Thus, we encourage the Department to avoid that scenario.

Conclusion

SHRM supports the Department's intent behind the RFI, which we believe will benefit employers and employees alike. We thank the Department for the opportunity to comment.

Sincerely,



Emily M. Dickens, J.D.
Chief of Staff, Head of Public Affairs & Corporate Secretary
SHRM
1800 Duke Street
Alexandria, VA 22314