American Bankers Association
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Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
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)

Dear Mr. Canary:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on its *Request for Information – SECURE 2.0 Reporting and Disclosure* (RFI).[2] The purpose of the RFI is to solicit public input on, and begin developing a public record for, certain provisions of Division T of the Consolidated Appropriations Act, 2023 (SECURE 2.0) that may revise, amend, or otherwise impact the reporting and disclosure framework of the Employee Retirement Income Savings Act of 1974 (ERISA).[3] The RFI includes a series of questions, asking among other things (i) whether and how the Department should address performance benchmarks for asset allocation funds (Question 9), (ii) whether and how defined contribution plan fee disclosure requirements should be revised (Question 12), and (iii) whether ERISA plan administrators (which include our member banks acting as fiduciaries), as a condition for relying on the electronic delivery safe harbor regulation, should be required to monitor retail retirement investors in order to determine whether such investors have actually accessed or downloaded an electronically furnished disclosure (Question 21).

Our response to the RFI focuses specifically on these three questions. In summary, we believe that the disclosure and reporting regimes referenced in these questions are comprehensive, sufficient, and effective, and therefore do not require any further changes. Consequently: (i) no revisions or additions are necessary for the benchmark requirements as laid out in SECURE 2.0, Section 318, and (ii) no changes, amendments, or revisions are necessary for the requirements of Rule 404a-5 (the participant disclosure regulation). Furthermore, plan administrators should not be required to monitor the online activity of retail retirement investors in order to rely on the electronic delivery safe harbor regulation. We would be glad to meet with Department staff as it

[1] The American Bankers Association is the voice of the nation's $23.5 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2.1 million people, safeguard $18.6 trillion in deposits, and extend $12.3 trillion in loans. Learn more at www.aba.com.
[2] *See* RFI, 88 *Fed. Reg.* 54,511 (2023).
[3] *Id.*

considers possible revisions to the ERISA reporting and disclosure requirements as required under SECURE 2.0-directed rulemaking and guidance.

I. The RFI.

The Department issued the RFI as part of its mandate under SECURE 2.0 to adopt or revise where necessary the Department's regulations and guidance governing ERISA reporting and disclosure requirements. This includes information affecting pooled employer plans, emergency savings accounts linked to retirement plans, defined contribution (DC) plan fee disclosure requirements, consolidating DC plan notices, and defined benefit (DB) annual funding notices. Our member banks serve as plan sponsors, fiduciaries, and service providers to retail and institutional retirement investors and would directly be affected by any Department action impacting retirement plan reporting and disclosure.

Of those areas listed for comment in the RFI, three issues are of particular interest and/or importance to our membership: (i) performance benchmarks for allocation funds, (ii) DC plan fee disclosure requirements, and (iii) electronic delivery of plan information. Specifically, among the 31 questions designed to determine the extent and manner of the Department's actions on reporting and disclosure, we have focused our responses on Question 9 (performance benchmarks for asset allocation funds), Question 12 (fee disclosures to retail retirement investors), and Question 21 (retirement investor access to electronically provided plan information) herein.

II. ABA Responses and Recommendations Concerning the RFI.

A. Question 9 (Performance Benchmarks): The Department Should Not Make Any Changes, Additions, or Revisions to the Benchmark Requirements as Laid Out in SECURE 2.0 Section 318.

Section 318 of SECURE 2.0 requires the Department to issue regulations on fiduciary investment duties and the types of benchmarks used to measure designated retirement plan investments.[4] The rules include responsibilities that would ensure that the benchmark provides accurate and updated information that would be useful for plan participants and allow them to make informed decisions about the investments in their plan. Specifically, section 318 requires the Department to issue regulations under ERISA section 404 (fiduciary duties) providing that:

> In the case of a designated investment alternative [DIA] that contains a mix of asset classes, the administrator of a plan may, but is not required to, use a benchmark that is a blend of different broad-based securities market indices if --
>
> (1) the blend is reasonably representative of the asset class holdings of the [DIA];
>
> (2) for purposes of determining the blend's returns for 1-, 5-, and 10-calendar-year periods (or for the life of the alternative, if shorter),

[4] *Id.*, 88 *Fed. Reg. at* 54,513.

the blend is modified at least once per year if needed to reflect changes in the asset class holdings of the [DIA];

(3) the blend is furnished to participants and beneficiaries (hereinafter collectively, participants) in a manner that is reasonably calculated to be understood by the average plan participant; and

(4) each securities market index that is used for an associated asset class would separately satisfy the requirements of such regulation for such asset class.[5]

Question 9 asks whether there are "additional factors" beyond the criteria listed in (1) through (4) above that plan administrators should employ to ensure that they can effectively select and monitor (and participants can effectively understand and use) blended performance benchmarks for mixed asset class funds.[6]

We believe that the factors set forth in section 318 are sufficient in employing a benchmark that blends mixed asset class funds. These factors make certain that (i) the blend fairly represents the DIA's asset class holdings, (ii) the blend is updated at least annually to accurately present 1-, 5-, and 10-year returns, (iii) the language used to describe the blend is intended to be understood by plan participants, and (iv) each of the market indices used for the relevant asset class would separately comply with applicable requirements. Should it consider additional or modified factors, we request that the Department avoid rigid or overly prescriptive requirements and further allow plan administrators the flexibility to provide participants useful and understandable benchmarking information (*e.g.*, the methodology and frequency for calculating a blended benchmark) in a technologically neutral manner.

B. Question 12 (Fee Disclosures): The Department Should Not Make Any Changes, Additions, or Revisions to the Fee Disclosure Requirements of Rule 404a-5.

Section 340 of SECURE 2.0 requires the Department to review Rule 404a-5 concerning the fiduciary requirements for disclosure in participant-directed individual account plans.[7] The review must assess whether any improvements may be made in the content and design of the disclosures that would enhance participants' understanding of DC plan fees and expenses, including the cumulative effect of such fees on retirement savings over time. The Department's findings must be submitted as a report to Congress, including any recommendations for legislative changes.[8]

In connection with this directive, the Department is soliciting public feedback on participant disclosures. Question 12 asks whether Rule 404a-5 might be improved to help participants better understand the fees and expenses that are charged to their participant-directed individual account

[5] *See* SECURE 2.0 § 318, 88 *Fed. Reg. at* 54,513.
[6] *See* 88 *Fed. Reg. at* 54,513.
[7] *See* SECURE 2.0 § 340, 88 *Fed. Reg. at* 54,513.
[8] *See id.*

plans.[9] The Department also asks whether additional or different content, including different design, formatting, or delivery requirements, may serve to improve participants' understanding of the costs associated with participating in their respective plan, including the costs of available investment options.

We believe that the disclosures provided currently to participants under the requirements of Rule 404a-5 are sufficient for participant understanding of plan fees and expenses. The regulation – which has functioned smoothly since its enactment in 2012 – provides a comprehensive regime of disclosure of plan-related information, administrative expenses, individual (as opposed to plan-wide) expenses, investment-related information, and fees and expenses information for DIAs. The Department also requires investment-related information to be provided in a chart or other format designed to facilitate a comparison between investment alternatives.[10] We are not aware of employee benefit plans or plan fiduciaries or administrators encountering difficulties or issues in furnishing the participant disclosures under Rule 404a-5, nor are we aware of any broad-based retirement investor complaints or concerns over the content, form, or manner of disclosures provided to participants under the regulation.

Rule 404a-5 further includes provisions designed to ensure participant understanding of the fees and expenses disclosed. For example, Rule 404a-5 (section (e)(2)) requires that the information prepared by the plan administrator be written "in a manner calculated to be understood by the average plan participant."[11] The regulation also allows in section (d)(4) the participant to receive from the administrator any investment-related information on request.[12] Section (d) of the regulation further requires the administrator to provide to participants a general glossary of terms to assist participants in understanding the DIAs.[13] These requirements collectively provide multiple layers of participant safeguards to ensure that disclosures are accessible, received, and understood. Any improvements to participant disclosures likely can be effected – with industry consultation and input -- through agency guidance on Rule 404a-5's existing requirements, similar to the FAQ guidance that the Department issued on Rule 404a-5 shortly after it was finalized.[14]

C. Question 21 (Monitoring Access to Electronically Furnished Disclosures): The Department Should Not Require Plan Administrators to Monitor Participants to Determine Whether Electronically Furnished Information Has Been Accessed or Downloaded.

Section 338 of SECURE 2.0 directs the Department to update its applicable guidance governing electronic disclosure as necessary to ensure, among other things, that participants are permitted the opportunity to request that any disclosure required to be delivered on paper under such guidance shall be furnished electronically.[15] The "applicable guidance" herein refers to the

[9] *See* 88 *Fed. Reg. at* 54,513.
[10] *See* 29 C.F.R. § 2550.404a-5 (fiduciary requirements for disclosure in participant-directed individual account plans).
[11] *Id.*, 29 C.F.R. § 2550.404a-5(e)(2).
[12] *See id.*, 29 C.F.R. § 2550.404a-5(d)(4).
[13] *See id.*, 29 C.F.R. § 2550.404a-5(d)(1)(vi).
[14] *See* Department of Labor, Field Assistance Bulletin (FAB) 2012-02 (May 7, 2012).
[15] *See* SECURE 2.0 § 338, 88 *Fed. Reg. at* 54,514.

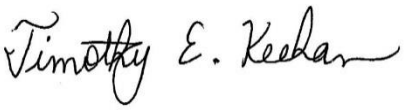
Department's more recently enacted alternative method for disclosure through electronic media, known as the "notice-and-access" electronic delivery safe harbor, which was intended to streamline the requirements for electronic notice and delivery of plan information to participants (2020 Safe Harbor).

Question 21 asks whether the Department should condition a plan's use of the 2020 Safe Harbor on an individual's (participant's) actually accessing or downloading an electronically furnished disclosure.[16] The Department adds whether the plan administrator should also be required to determine the length of time the individual accessed the disclosure. The Department then asks whether the administrator should be required to monitor whether individuals actually visited the specified website or logged on to the website. If such monitoring reveals that individuals have not visited or logged on to the specified website (meaning that effective disclosure was not achieved through website access), the Department then asks whether the 2020 Safe Harbor should require the plan administrator to revert to paper disclosures or take some other action.

We strongly believe that plan administrators should not be responsible for monitoring individuals to confirm whether they have actually accessed or downloaded any electronically furnished disclosure. These individuals previously have agreed to accept disclosures electronically. Consequently, whether and when they access or download any electronic disclosure should be left entirely at their discretion. It would be both intrusive and paternalistic to require plan administrators to monitor individuals' internet access and usage. Moreover, this would substantially raise compliance costs – and reduce investment returns – to install and maintain monitoring technology and track participants' access, especially given that a number of plan participants may voluntarily choose, for whatever reason, not to access or download a particular electronically furnished disclosure or other document. The Department monitoring requirement further would raise significant privacy concerns for those individuals. Monitoring individuals' "access in fact" of electronic disclosures would effectively gut a plan administrator's use of the 2020 Safe Harbor by imposing a privacy-invasive standard solely because of the means of delivery, with no legal or policy rationale or justification.[17]

Thank you for your consideration of our views and recommendations. If you have any questions or would like to discuss, please contact the undersigned at 202-663-5479 (tkeehan@aba.com).

Sincerely,



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[16] *See* 88 *Fed. Reg. at* 54,515. Question 21 also asks the same questions with respect to the Department's more rigid 2002 electronic delivery safe harbor. *See* 29 C.F.R. § 2520.104b-1(c). Although Rule 104b-1(c) is seldom used by plans, our response to Question 21 would apply similarly to the 2002 electronic delivery safe harbor.

[17] We are not aware of any Department rule or guidance that requires a plan sponsor or service provider to determine if or when plan participants open their statements or mail (whether received by paper or electronic delivery), and whether they read or review the contents.