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Filed Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655
US Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attention: Request for Information—SECURE 2.0 Reporting and Disclosure

Re: *RIN 1210-AC23; Request for Information—SECURE 2.0 Reporting and Disclosure*

To Whom It May Concern:

The Investment Company Institute (ICI or the "Institute")[1] is pleased to submit comments on the Department of Labor's (the "Department's") Request for Information (RFI)[2] regarding certain changes to ERISA enacted under the Consolidated Appropriations Act, 2023 (CAA), which includes the SECURE 2.0 Act of 2022 ("SECURE 2.0 Act" or "Act"). The RFI solicits input on several provisions of the SECURE 2.0 Act that impact ERISA's reporting and disclosure requirements.

The Institute supported the Act because it provides more tools for American families to save for and achieve a financially secure retirement. The Act supports a holistic approach to financial wellness by encouraging emergency savings and allowing employers to make matching contributions to retirement plans based on an individual's student loan payments. Additionally, the legislation will expand the use of pooled employer plans and raise catch-up contribution limits in key working years, building on policies proven to work for our nation's savers. As the Department highlights in the RFI, several provisions of the Act impact ERISA's reporting and disclosure requirements, an important aspect of ERISA. ICI strongly supports efforts to help participants in defined contribution plans better understand their plans and the investments available to them.

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $31.5 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.8 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through ICI Global.

[2] The RFI was published at 88 Fed. Reg. 54511 (August 11, 2023).

Due to its breadth, implementing the SECURE 2.0 Act will require significant rulemaking and guidance from the Department, the Department of the Treasury ("Treasury"), and the Internal Revenue Service (IRS) (collectively, the "Agencies"). In addition, the Act directs the Agencies to complete several studies and to submit reports to Congress, designed to inform lawmakers for purposes of future legislation or oversight. We appreciate that the Department has taken the step of issuing the RFI to solicit public feedback to inform its actions prior to issuing guidance or proposed rulemakings. As the Department notes in the RFI, its subsequent actions will be better informed as a result.[3]

Executive Summary

Our response to the RFI addresses the following points.

- Requirement to Provide Paper Statements in Certain Cases. The Department should not modify the 2002 electronic delivery 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 electronic delivery 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 addition, an "access in fact" standard for electronic communications would impose unreasonably burdensome and prohibitively costly requirements that far exceed those applied to paper communications.

- Defined Contribution Plan Fee Disclosure Improvements. 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, the Department 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 the Department 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. Detailed guidance is not needed to implement section 318 of the SECURE 2.0 Act. In amending the participant fee disclosure regulation as directed by the Act, we urge the Department 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. We further suggest that any guidance address the use of third-party blended indexes as the benchmark for asset allocation funds.

- Pooled Employer Plans (PEPs). We recommend the Department utilize a confidential questionnaire to gather information for its PEP study and report, to the extent such information is not otherwise available to the Department. It is imperative that any non-public proprietary information the Department 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.

[3] 88 Fed. Reg. at 54511.

- Emergency Savings Accounts Linked to Individual Account Plans. Plans and plan service providers face significant challenges in implementing pension linked emergency savings accounts. As such, we urge the Department, 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. As a long-time advocate of consolidation of plan-related notices, we suggest 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. We recommend the Department 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.

1. Requirement to Provide Paper Statements in Certain Cases.

ICI has long touted the benefits of electronic delivery[4] and supported the safe harbor for default electronic delivery finalized by the Department in 2020 (the "2020 Safe Harbor").[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 the delivery of "covered documents" to "covered individuals."[6] ICI continues to believe that, in crafting the 2020 Safe Harbor, the Department struck the right balance between making it easier to use electronic delivery while ensuring that sufficient participant protections are in place. Among those safeguards, the rule was drafted to ensure that plan participants and beneficiaries will understand their rights with respect to electronic delivery, that they can easily opt out of all electronic delivery, and that they can receive free paper copies of notices at their request. Further, the safeguards result in a delivery method that is reasonably calculated to ensure actual receipt of the ERISA-required documents.

Section 338 of the SECURE 2.0 Act requires that, effective for plan years beginning after December 31, 2025, defined contribution plans must provide one of the four quarterly benefit statements required by

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[4] See letter from David M. Abbey, Deputy General Counsel–Retirement Security, ICI and Doug Fisher, Director of Retirement Policy, American Retirement Association, to Preston Rutledge, Assistant Secretary of EBSA, Department of Labor (April 30, 2018), available at https://www.ici.org/pdf/31186a.pdf, transmitting Peter Swire and DeBrae Kennedy Mayo, 2018 Update to Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery, available at https://peterswire.net/wp-content/uploads/2018-Update-to-Delivering-ERISA-Disclosure-for-DC-Plans-002.pdf.

[5] For ICI's comments in response to the Department's proposed safe harbor, see letter from David M. Abbey, Deputy General Counsel–Retirement Security and Shannon Salinas, to Office of Regulations and Interpretations, EBSA (November 22, 2019), available at https://www.ici.org/system/files/attachments/32062a.pdf.

[6] Covered documents include any document that ERISA requires to be delivered to a retirement plan participant, with the exception of any document required to be furnished only upon request. Covered individuals include any participant, beneficiary, or other individual who has provided the employer or plan administrator with an email address or an "internet-connected mobile-computing device" (e.g., a smartphone) number. It also includes an employee to whom the employer has assigned an email address.

ERISA section 105(a) in paper form. In implementing section 338, we urge the Department not to undo the important progress it has made, which occurred after several years of deliberation and significant stakeholder outreach.[7]

1.1 Additional modifications to the 2002 Safe Harbor are not needed.

In issuing the 2020 Safe Harbor, the Department left in place its prior safe harbor on electronic delivery, issued in 2002 (the "2002 Safe Harbor"). 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.

The new one-paper-statement-per-year requirement in the SECURE 2.0 Act includes two exceptions: (1) where the plan is providing electronic delivery in accordance with the 2002 Safe Harbor and (2) where a plan permits a participant or beneficiary to request the statement to be delivered electronically and the participant or beneficiary has made the request. 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. In Question 19 of the RFI, the Department asks what modifications to the 2002 Safe Harbor are needed to implement section 338 of the SECURE 2.0 Act. The Department further asks whether it should modify the 2002 Safe Harbor to include an initial paper notice that resembles the initial paper notice required by paragraph (g) of the 2020 safe harbor regulation.[8]

Simply put, no additional modifications to the 2002 Safe Harbor are needed. ICI urges the Department not to make any changes, other than the narrow new requirement described under the Act—that is a one-time initial notice on paper of the right to request that all documents required to be disclosed under ERISA be furnished on paper, with respect to participants who first become eligible to participate, and beneficiaries who first become eligible for benefits, after December 31, 2025.

The 2002 Safe Harbor has been in use for over 20 years and has proven to work well for participants. There seemed to be consensus on this point in the discussion of comments received on the proposed version of the 2020 Safe Harbor, even among those stakeholders who do not support expansion of

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[7] For example, in 2011 the Department issued a request for information regarding electronic disclosure by employee benefit plans, published at 67 Fed. Reg. 19285 (April 7, 2011).

[8] Before relying on the 2020 Safe Harbor, paragraph (g) requires that a plan must provide a one-time paper notice to each individual to alert the individual that the covered documents will be provided electronically. This initial notice must include:

- identification of the electronic address that will be used for the individual;
- any instructions necessary to access the covered documents;
- a cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document;
- a statement of the right to request and obtain a paper version of a covered document, free of charge, and an explanation of how to exercise this right; and
- a statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right.

electronic delivery.[9] Further, harmonizing the two safe harbors by implementing the one-time paper notice required by section 338 in a way that resembles the initial paper notice requirement under paragraph (g) of the 2020 Safe Harbor, as suggested in the RFI, is not necessary. The population of participants eligible for the 2002 Safe Harbor (employees who are "wired at work" or affirmatively consent to electronic delivery) is significantly narrower and more targeted that the wider population eligible for the 2020 Safe Harbor and less likely to need the additional information (i.e., information beyond the explanation of the right to request all documents in paper).

1.2 Additional guidance on the 2020 Safe Harbor is not needed.

In addition to the new requirement to provide one quarterly benefit statement in paper each year, paragraph (b)(2) of section 338 of the SECURE 2.0 Act directs the Department to ensure that the 2020 Safe Harbor meets several specific conditions. In Question 20 of the RFI, the Department asks what modifications to the 2020 Safe Harbor are needed to implement section 338.

The Department does not need to issue additional guidance to apply the SECURE 2.0 Act's regulatory specifications to the 2020 Safe Harbor because those specifications either: (1) describe existing practices, such as the provision clarifying that plans may furnish participants with electronic duplicates of paper statements; or (2) duplicate requirements that are already included in the 2020 Safe Harbor, such as the rule prohibiting fees for the delivery of paper statements.

The Department further asks in the RFI whether the quarterly benefit statements should contain the content of the initial paper notice described in paragraph (g) of the 2020 Safe Harbor.[10] The answer to this question is no. As described below, participants already receive the information they need, and therefore, there is little to no benefit to outweigh the cost of implementing this change and the potential it has to confuse participants.

Under the 2020 Safe Harbor, a plan must furnish a Notice Of Internet Availability (NOIA) for each quarterly benefit statement to alert the participant when it is made available on the website.[11] While the content of the NOIA[12] and the content of the initial paper notice described in paragraph (g) are not

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[9] In recognition of this general consensus, the Department made only non-substantive conforming amendments to the 2002 Safe Harbor to facilitate the 2020 Safe Harbor. See footnote 32 of the preamble to the final rule. 85 Fed. Reg. 31884, at 31887 (May 27, 2020).

[10] See footnote 8, supra.

[11] See our request below to modify this requirement by allowing the quarterly benefit statements to be covered by the annual combined NOIA.

[12] A NOIA must contain the following information:

A. A prominent statement—for example as a title, legend, or subject line—that reads: ''Disclosure About Your Retirement Plan.''
B. A statement that reads: ''Important information about your retirement plan is now available. Please review this information.''
C. An identification of the covered document by name (for example, a statement that reads: "your Quarterly Benefit Statement is now available") and a brief description of the covered document if identification only by name would not reasonably convey the nature of the covered document.
D. The internet website address, or a hyperlink to such address, where the covered document is available.
E. A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right.

identical, there is substantial overlap.[13] For example, both notices include an explanation of the right to request a paper version of a document, or to opt out of electronic delivery. Participants receiving notices under the 2020 Safe Harbor will already receive the relevant information they need on the NOIA—there is no need to require that this information appear on the statement itself.[14]

Further, requiring such new information on the quarterly benefit statements may ultimately result in participant confusion. Plans typically prefer to use the same format for statements whether they are delivered in paper or electronically. To avoid the plan having to track and match the format of the benefit statement with the delivery method for each individual participant, which would be prohibitively burdensome, it is likely that such a requirement would result in the content of the initial paper notice being added to the statements to all participants. This could cause confusion to participants who are receiving the statements in paper.

Though we believe that changes to the 2020 Safe Harbor are unnecessary to implement section 338, if the Department decides to make changes, then we urge it to amend the special rule for annual combined NOIAs[15] to include quarterly benefit statements in the list of documents covered. Under the special rule, plans may furnish one annual combined NOIA to cover several documents that will be provided throughout the year. Under the proposed safe harbor, the Department permitted quarterly benefit statements to be covered by the combined NOIA, but it reversed this decision under the final version of the 2020 Safe Harbor. The Department stated its intention, however, to give further consideration to this issue in the future.[16]

In the preamble to the proposed rule, the Department explained that it had considered allowing the combined NOIA to be emailed less frequently than annually. However, the Department decided to require that it be sent annually in light of the fact that (as proposed) the combined NOIA covered quarterly benefit statements. It concluded that this balanced approach—requiring that the combined NOIA be sent annually and allowing it to cover quarterly benefit statements—"provides a more balanced approach that provides sufficient protection for participants while generating substantial cost savings."[17] It also noted that the

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F. A statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right.
G. A cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document.
H. A telephone number to contact the administrator or other designated representative of the plan.

[13] We note that the differences between the two notices are attributable to the different purposes of the notices. In the Department's words, "the Department notes that the initial notice is not the only protection for participants and beneficiaries who will be transitioned to notice-and-access electronic disclosure. The specific purpose of the initial notice is to alert covered individuals to the coming change and of their rights under the new disclosure framework. Covered individuals, however, will continue to be informed of these rights in all future NOIAs." See 85 Fed. Reg. at 31901.

[14] Unlike the NOIA, the initial notice requires identification of the electronic address that will be used for the individual. Adding this personalized piece of data on each benefit statement would require system changes, the cost of which would far outweigh any possible benefit.

[15] 29 CFR 2520.104b–31(i).

[16] See discussion at 85 Fed. Reg. at 31904-5.

[17] 84 Fed. Reg. 56894, at 56921 (October 23, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-10-23/pdf/2019-22901.pdf.

Thrift Savings Plan (TSP) provides its quarterly statements electronically, unless an individual requests mail delivery.[18] The TSP delivers annual statements by mail, unless an individual requests only electronic annual statements. The TSP does not provide an annual notice akin to the NOIA.

Participants in plans using the 2020 Safe Harbor will begin receiving one paper statement each year, and they will continue receiving the combined NOIA each year. Thus, there is sufficient basis for returning to the provision as proposed and allowing the remaining three quarterly benefit statements to be covered by the combined NOIA. In doing so, the 2020 Safe Harbor's treatment of quarterly benefit statements would still be more protective than the TSP's default delivery methods.

1.3 An "access in fact" standard would be unreasonably burdensome, as the Department previously concluded.

In Question 21 of the RFI, the Department asks whether both safe harbors should be modified to require plans to monitor whether a participant actually accessed the electronically furnished document (the Department refers to this standard as "access in fact"), and if the participant has not, then to revert to paper delivery. While some large recordkeepers do have the capability to track when a participant accesses the plan's website or opens an email, the Department should not modify the safe harbors to require plan administrators to track whether individuals actually visited the specified website or logged on to the website.

As discussed in the preamble to the 2020 Safe Harbor, the Department posed a similar question with respect to the proposal issued in 2019.[19] The Department received comments on both sides of this issue and declined to include a monitoring requirement.[20] The three conclusions the Department reached in 2020 continue to hold true.

<u>Imposition of a monitoring requirement could be very expensive, especially for small plans</u>. The Department acknowledges that replacing technological systems and procuring plan services to meet a monitoring requirement would be a costly endeavor.

> Even the most basic requirement for website monitoring, for example tracking the instances of users visiting a particular page on a website or views of a screen on an app, would require a web analytics tool, according to the commenters. Even for plan administrators that already, as suggested by a few commenters, engage in some level of monitoring, transitioning their systems and procedures to comply with a specific, technical requirement in this safe harbor would not be without some burden and cost.[21]

We agree with the Department's conclusions, although we argue that they are understated. Imposition of a monitoring requirement would be prohibitively expensive for all plans, evens ones that currently engage in some level of tracking. Tracking whether a participant has logged onto a website once in a given year is not comparable to tracking whether each participant has opened specific pages of that website, at least six times per year (four benefits statements, the section 404(a) fee disclosure, and the summary annual report

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[18] Id. at 56897.

[19] Id. at 56906.

[20] 85 Fed. Reg. 31884, at 31900 (May 27, 2020), available at https://www.govinfo.gov/content/pkg/FR-2020-05-27/pdf/2020-10951.pdf.

[21] Id.

(SAR)), and tracking when the documents were sent (presumably the plan would need to wait some amount of time after delivery before determining that it was not going to be opened). Even recordkeepers who perform some level of tracking simply do not have the systems/capabilities in place to perform the kind of monitoring suggested by Question 21 of the RFI. Both the initial implementation and the ongoing burden of monitoring would likely make it infeasible to furnish documents by electronic delivery.

<u>The safeguards included in the 2020 Safe Harbor are sufficient</u>. The Department concluded that, taken together, the rule's protections "provide a method of furnishing documents that is more than reasonably calculated to ensure actual receipt of covered documents."[22] One of the safeguards, described in paragraph (f)(4), requires the system to alert the administrator when an email is returned as invalid or inoperable. In such case, the administrator must promptly take reasonable steps to cure the problem. Further, the initial notice and NOIAs communicate the documents the participant can expect to receive as well as their rights to receive paper and to opt out of electronic delivery.

<u>There is not "a compelling reason to establish a stricter standard for monitoring covered individuals' use of disclosures furnished electronically than for paper deliveries</u>."[23] Here, again, we agree with the Department's 2020 conclusion. The safeguard in paragraph (f)(4) described above (requiring monitoring for inoperable or invalid email addresses), is analogous to the standards that apply when a letter to a physical mailing address is returned as undeliverable. Implementation of a requirement to monitor whether participants have opened notices delivered electronically would impose a higher standard on electronic delivery compared with paper delivery. This seems to suggest that paper delivery is inherently better or more reliable than electronic delivery, a concept with which ICI strongly disagrees. To provide a neutral rule, the Department would also have to require that a failure to open a paper statement would lead to a switch to electronic delivery. Ultimately, a requirement to monitor whether a notice is opened or read goes beyond ERISA's disclosure obligations, which require that plan administrators "furnish" ERISA-required notices.

In addition to the three reasons articulated by the Department in 2020, our members raised the following additional arguments against a monitoring requirement or "access in fact" standard.

- The 2020 Safe Harbor intentionally applies to a broad range of technologies in addition to emails and internet browser websites, designed to accommodate future technical innovations.[24] It is not uncommon for plans to send certain documents as PDFs attached to an email or posted on an employer's intranet, rather than the plan's website (e.g., the SAR). A requirement to monitor would likely limit the technologies that plans could use for electronic delivery, which is counter to one of the Department's goals for the 2020 Safe Harbor.
- The cost and burden of complying with a monitoring requirement as described in the RFI would make the safe harbors essentially unusable and would discourage the use of electronic delivery. This backward step away from modernization would negate the benefits of electronic delivery.[25]

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[22] Id.

[23] Id.

[24] See 85 Fed. Reg. at 31894 and 31898.

[25] Greater use of electronic delivery will: facilitate positive participant plan engagement and savings behavior; enhance the effectiveness of ERISA communications, particularly for individuals with disabilities or for whom

- It has been the experience of our members that sending paper to participants who expect electronic delivery can anger participants. The fact that a participant has not opened an email or clicked on a link does not mean that they do not know the notice is there. There are many reasons they might not access the document at that time, but they know where they can find it at the time when they need it.[26] Members report that they receive complaints when a participant receives paper despite electing electronic delivery. Some do not want to receive sensitive documents in paper in their mailbox for safety reasons, where they can be accessed by criminals and making them vulnerable to identity theft. Some prefer electronic delivery because of environmental concerns.[27]

- Rather than add requirements like this that place greater burdens on electronic delivery, the Department should focus on where its rules can be harmonized with other regulators' rules. The notice and access model is prevalent; in contrast, we are not aware of any other regulator implementing an "access in fact" model.

A monitoring requirement would take notice delivery in the wrong direction. For all the reasons described above, we urge the Department not to implement a monitoring requirement as contemplated by Question 21 of the RFI.

2. Defined Contribution Plan Fee Disclosure Improvements.

Section 340 of the SECURE 2.0 Act directs the Department to review its existing regulation for participant fee disclosure in participant-directed individual account plans[28] and to explore how the disclosures could be improved to enhance participants' understanding of plan fees and expenses. The Act requires the Department to report to Congress on its findings, including recommendations for legislative changes to address the findings, within three years of enactment. The disclosure regulation in question was finalized in 2010, implemented beginning in 2012, and requires plan administrators to provide participants with key information about the plan and plan investments, at enrollment and annually thereafter. This information enables participants to make informed decisions about participating and allocating their accounts among plan investments.

ICI strongly supported this regulation because it focuses on the key information of use to participants and provides for comparability and clarity. The regulation required plan administrators to provide, for the first time, comparable information on all the investment options available in a plan, regardless of product type. Importantly, the required information on investment-level fees is balanced with other pertinent information on historical performance and performance benchmarks, along with additional information

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English is not the primary language; produce significant cost savings for more than 80 million retirement savers; and reduce the environmental impact of tons of discarded paper every year. See letters and white paper referenced in footnotes 4 and 5.

[26] For example, a participant who has recently logged onto their account on the plan's website may be less likely to open and review a quarterly benefit statement, which will have out-of-date information compared to the balances they already viewed.

[27] As noted in ICI's response to the Department's proposal in 2019, we estimated that the switch to a default to electronic delivery could save 179,000 to 199,000 trees each year. See page 8 of the letter, referenced in footnote 5 available at https://www.ici.org/system/files/attachments/32062a.pdf.

[28] See 29 CFR 2550.404a-5.

available through layered web-based disclosure.[29] We continue to believe that, from an objective standpoint, the 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 assess the effectiveness of the fee disclosure framework, the Department will need to conduct a thorough examination beyond this RFI.

2.1 Further stakeholder input will be necessary.

A meaningful assessment will take more time. The Institute stands ready to work with the Department on a comprehensive examination of the participant fee disclosure regulation. We appreciate the benefits of taking a fresh look at long-standing rules, especially given the evolving marketplace for financial services and retirement savings products. As the Department notes, this RFI will be a helpful starting point and the Department may take additional steps in conducting the required review.[30] We strongly believe that additional steps will be necessary, as the effectiveness of these disclosures cannot be meaningfully assessed in the 60-day comment period for this RFI. Our member companies have noted that they receive very few inquiries from participants related to the required disclosures. This suggests that the need (or lack of need) for changes to the regulation should be studied carefully.

For any changes, the Department should follow the formal rulemaking process, taking costs into account. If the Department identifies areas for improvement, any changes to the specific regulatory requirements must be proposed through notice and comment rulemaking. As part of this process, the Department must take into account the implementation costs of any regulatory changes it determines to pursue, including for example the expense that would be associated with requiring further personalization of the disclosures. We also strongly urge the Department to seek further stakeholder input prior to finalizing any recommendations for the legislative changes contemplated by the SECURE 2.0 Act. While the Department is unlikely to need legislative changes to modify the fee disclosure regulation, the Department should ask for public comment on any potential recommendations in this regard.

2.2 The Department should remember that fees are only one important factor among many.

Finally, in studying the effectiveness of the disclosures and proposing any changes, the Department should be careful not to over-emphasize the importance of fees relative to other factors relevant to investment decisions. The fees associated with a plan's investment options are an important factor participants should consider in making investment decisions, but no participant should decide whether to contribute to the plan or allocate their account based solely on fees.[31] The Department should retain the balance struck in the existing regulation so that participants do not receive disclosure that places undue emphasis on fees relative to other factors. Furthermore, in assessing fees, it is important to consider the services and other benefits delivered in return for those fees.

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[29] This web-based disclosure must provide additional information such as the investment's objectives or goals, principal strategies (including a general description of the types of assets held by the investment) and principal risks, portfolio turnover rate, and updated performance data.

[30] 88 Fed. Reg. at 54513.

[31] For example, returns net of fees, along with an investor's timeframe, goals, and risk tolerance, will inform allocation choices.

3. Performance Benchmarks for Asset Allocation Funds.

The Department's current regulation on fee disclosure to participants in individual account plans under ERISA section 404(a),[32] discussed in section 2 of this letter, requires plan administrators to provide historical performance information on each of the plan's designated investment alternatives (DIAs) over specified time periods, along with the performance of an appropriate benchmark. More specifically, the regulation requires comparison to an "appropriate broad-based securities market index" over the same time periods. Section 318 of the SECURE 2.0 Act directs the Department to update this regulation within two years to permit plan administrators to use a blend of different broad-based indexes as the performance benchmark for a DIA that contains a mix of asset classes, such as a target date fund.

Prior to enactment of the SECURE 2.0 Act, guidance from the Department[33] permitted plan administrators to create and provide a blended benchmark (i.e., the blended returns of more than one broad-based index) as a secondary benchmark for DIAs that contain a mix of asset classes. The intent of section 318 of the SECURE 2.0 Act is to allow plans to provide a primary benchmark (or single benchmark, if the plan administrator so chooses) that is more reflective of the asset allocation fund's mix of asset classes, rather than potentially confusing participants with a primary/single benchmark that may not be representative of the returns and investment exposures of the DIA.

Section 318 requires that the blended index benchmark meet certain criteria: (1) the blend is reasonably representative of the asset class holdings of the DIA; (2) for purposes of determining the blend's returns for the 1-, 5-, and 10-calendar-year periods (or for the life of the alternative, if shorter), 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 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.

The RFI asks if there are additional factors beyond the criteria in section 318 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. It also asks, if there are other factors, which other factors the Department should consider when developing regulations.

3.1 Guidance should permit flexibility and discretion in creating, maintaining, and using blended benchmarks.

<u>We do not anticipate a need for detailed guidance to implement the criteria provided in section 318</u>. The Department's existing guidance on creating blended benchmarks (albeit as secondary benchmarks) generally has worked well and provides some flexibility. In particular, FAQ 16 of Field Assistance Bulletin 2012-02R explains that a plan administrator may use the target asset allocation of the 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.[34] According to the guidance, whether the target allocation is representative of the actual holdings of the DIA depends on

[32] See 29 CFR 2550.404a-5.

[33] See 75 Fed. Reg. 64910 at 64917 (October 20, 2010) and FAB 2012-02R (July 30, 2012).

[34] The guidance provides that 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.

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. The guidance also notes that the Department anticipates there are other similarly acceptable methods of determining whether target percentages are representative of actual holdings.

As the Department noted in the RFI, "the standards for use of a 'reasonable' blended performance benchmark [in FAB 2012-02R] are similar, but not identical, to the four criteria in section 318."[35] Notably, the statutory criteria in section 318 use the phrase "reasonably representative" and do not refer to "actual" asset holdings, which provides more flexibility than the existing Department standard requiring the blend to be "representative of the actual holdings." The Department could incorporate aspects of the guidance from FAB 2012-02R into the amended regulation, to the extent consistent with the more flexible statutory criteria. For example, the discussion in FAQ 16 of how to determine the weightings of the indexes used to create the additional blended benchmark, along with the acknowledgement that there could be other acceptable methods, could be incorporated as guidance on the section 318 requirement that the blend must be "reasonably representative" of the asset class holdings of the DIA.[36]

<u>Ultimately, we urge the Department to permit discretion on the part of plan administrators in constructing and modifying blended benchmarks, particularly in light of the wide range of asset allocation funds and their underlying investment exposures and evolving product market</u>. Imposing additional conditions beyond those of section 318 could discourage the use of blended benchmarks and undermine Congressional intent. In this vein, any disclosure requirements relating to participants' understanding of blended benchmarks should be reasonable and not overly detailed. For example, the Department could require disclosure of the *current* underlying components of the blended benchmark and their weights. More detailed information (e.g., about how the blend is constructed or how underlying weightings have changed over time) could confuse or overwhelm participants, discouraging them from reading the disclosures.

As an aside, we note that the directive given to the Department by section 318 of the SECURE 2.0 Act differs from—and in our view is far superior to—the Securities and Exchange Commission's (the "Commission") current requirements for providing performance benchmarks in mutual fund and ETF prospectuses and shareholder reports. Commission disclosure amendments and guidance adopted in 2022[37] require mutual funds and ETFs to provide fund performance information compared to an "appropriate broad-based securities market index" and permit the inclusion of blended or more narrow indexes as additional supplemental indexes. The Commission's approach requires that all funds compare

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[35] 88 Fed. Reg. at 54513.

[36] We note that the "reasonably representative" standard of section 318 accommodates a wider range of disparity between the target asset allocation percentages and the actual holdings of the DIA, compared to the "nearly equal" standard provided in FAQ 16 as an example of an acceptable method of determining whether target percentages are representative of actual holdings. The Department should consider modifying the description of the sample method to permit more flexibility than what is implied by "nearly equal."

[37] Final Rule on Tailored Shareholder Reports for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements, available at https://www.sec.gov/files/rules/final/2022/33-11125.pdf. The Commission now defines "appropriate broad-based securities market index" in relevant part as "one that is administered by an organization that is not an affiliated person of the Fund, its investment adviser, or principal underwriter, unless the index is widely recognized and used. A 'broad-based' index is an index that represents the overall applicable domestic or international equity or debt markets, as appropriate." The adopting release also provides guidance about what would qualify as an "appropriate broad-based securities market index."

performance to the overall market, which could be an apples-to-oranges comparison depending on the fund and could produce misleading performance presentations. The Institute strongly disagrees with the direction of the Commission in this regard and has urged the Commission to adopt a position with respect to multi-asset class funds similar to the approach of section 318 to enable funds to provide investors apt and useful performance comparisons and to streamline presentations as they deem appropriate.[38] As the Department works to implement Congress' directive under section 318, it should not look to the Commission's disclosure requirements and guidance for assistance, as they directly conflict with the clear statutory language of the SECURE 2.0 Act.

3.2 The Department should clarify treatment of third-party blended indexes.

A related issue that the Department should consider addressing in amending the regulation is the use of a blended index created by an independent third-party as the primary benchmark for an asset allocation fund. Third-party index providers, for example, create target date indexes meant to be broadly representative of target date funds' asset class exposures and glide paths for each target date year.[39] A target date index of this nature is a blend of broad-based indexes, with a mix determined not by reference to a single target date fund, but rather to multiple target date funds (e.g., on a market-weighted basis). Many target date fund providers choose to use these types of third-party indexes as benchmarks because they provide a single point of reference that facilitates a comparison of different target date funds by using a blend that reflects broader market asset allocation and glide path practices.

<u>We believe this type of third-party-created blended index should be a permitted primary (or single) benchmark</u>. Section 318 appears to contemplate a custom blend created to be "reasonably representative" of the asset class holdings of each specific DIA. But a blend based on a target date fund category also should be viewed as "reasonably representative" of a target date fund, depending on the circumstances. A non-bespoke third-party blended index has the benefit of providing greater comparability for broadly-similar asset allocation funds of a particular type (such as target date funds) and may be reasonably representative of the asset class. Alternatively, it would be appropriate to characterize a third-party blended benchmark as a "broad-based securities market index" under the Department's existing benchmarking requirements. Regardless, however, of the particular basis for concluding that a third-party blended benchmark may be the primary (or single) benchmark for an asset allocation fund, it is clear that such an approach is consistent with sound public policy given the benefits of comparability across funds and the utility of benchmarks that reflect broader market practices.

4. Pooled Employer Plans.

Section 344 of the SECURE 2.0 Act requires the Department to conduct a study on pooled employer plans (PEPs), including their impact on coverage, and provide a report to Congress within five years of enactment and every five years thereafter. The report should make recommendations on how PEPs can be improved to serve and protect participants. Section 101 of the Setting Every Community Up for Retirement Enhancement Act ("SECURE Act") of 2019 created the PEP as a new type of multiple employer defined contribution plan that employers could join even if unrelated to other participating

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[38] Letter from Investment Company Institute to Securities and Exchange Commission dated Dec. 21, 2020, available at https://www.sec.gov/comments/s7-09-20/s70920-8186011-227164.pdf.

[39] See, e.g., https://www.spglobal.com/spdji/en/indices/multi-asset/sp-target-date-2030-index/#overview.

employers. PEPs became available beginning in 2021, but they are still in their infancy and the marketplace is developing.

Section 344 requires the Department's study to address the following aspects of PEPs:

- 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;
- 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 the Department determines is necessary.

Through the RFI, the Department "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."[40]

Currently, information regarding PEPs is reported on Form PR (Registration for Pooled Plan Provider) and Form 5500 (Annual Return/Report of Employee Benefit Plan). The RFI asks what other data sources (beyond the Form PR and Form 5500) the Department could use to collect information needed for the study, particularly the information on fees and investment options in PEPs. We are not aware of any other existing data sources that would provide comprehensive information about PEP offerings. One approach the Department could take is to review the websites of registered pooled plan providers, though this type of review is unlikely to generate all of the information envisioned by section 344.

Instead, we recommend that the Department gather any information required by the study that is not available on Forms PR and 5500 filings by sending a confidential questionnaire to all registered pooled plan providers. Many of our members that offer PEPs have indicated their willingness to participate in such a questionnaire, with one important caveat. It is crucial that any information the Department gathers that is not reported on a public filing must remain confidential, with results disclosed in the report 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. In addition, the Department must ensure the security of the data in its possession through appropriate cybersecurity controls.

5. Emergency Savings Accounts Linked to Individual Account Plans.

ICI has long supported efforts to increase participation in employer sponsored retirement plans. Pension-linked emergency savings accounts (PLESAs), as provided for in section 127 of the SECURE 2.0 Act,

[40] 88 Fed. Reg. at 54512.

address an important barrier to increasing lower-compensated employee participation in employer-sponsored individual account plans. The Department should consider the following as it develops guidance on PLESAs:

- First, as the RFI notes, section 127 implicates many provisions of both ERISA and the Internal Revenue Code. Accordingly, we view it as imperative that the Department and IRS coordinate closely on any guidance impacting PLESAs. It would be very helpful to those implementing this guidance if the Department and IRS also coordinated the timing of release of such guidance.

- Second, it is critical that any guidance provide flexibility as to the design and operation of PLESAs. Offering PLESAs will require sponsors, plans, recordkeepers, other plan service providers, and payroll providers to work together to build new frameworks and establish new pathways for coordination. These builds will differ significantly across plans. As such, increased flexibility in PLESA design and operation will facilitate greater adoption of PLESAs.

- Third, we note that new ERISA section 803, while permitting the Department to prescribe regulations as necessary to address PLESA reporting and disclosure requirements, also states that the Department shall "seek to prevent unnecessary reporting and disclosure for such accounts…." We believe that additional reporting and disclosure requirements for PLESAs, beyond those provided for in the SECURE 2.0 Act, are not necessary. To the extent the Department were to have a different view, it is imperative that this be communicated to the regulated community as soon as possible so that impacted parties can have a complete picture before building the needed systems and integrations.

- Fourth, and related to the above point regarding PLESA reporting and disclosure, new ERISA section 801(c)(1)(A)(iii) sets forth requirements for the deposit account or investment product in which PLESA assets are held. We ask that the Department confirm that it would be permissible to restrict the availability of such account or investment product to PLESA assets only. If that is the case, guidance should indicate (i) where to describe such restriction in the section 404(a) participant disclosures (e.g., within the plan-level information), and (ii) whether to treat an account or investment product designated to hold only PLESA assets as a DIA subject to the investment-level disclosure requirements under section 404(a).

In addition to the recommendations above, we support a model notice or model language for the required notice under section 801 of ERISA. Any such notice or language should provide sufficient flexibility to enable plan administrators to adapt it to the specific provisions of a particular plan.

6. Consolidation of Defined Contribution Plan Notices.

ICI has long advocated for consolidation of the ever-increasing number of notices that must be provided to participants and beneficiaries of individual account plans. Many of these notices restate information provided to participants in other notices. As a general matter, we view consolidated information as more useful to participants and more likely to be both read and understood because it can be read in context with other plan-related information. Moreover, we are concerned that as the number of notices provided to participants increases it is less likely that participants will pay attention to the notices (irrespective of whether they are provided in paper or electronically).

<u>The Department should adopt guidance designed to encourage notice consolidation</u>. We believe the following suggestions for guidance would help facilitate consolidation of notices, and as such more effective communications to plan participants.

- First, we are concerned that service providers may be hesitant to consolidate notices absent further assurances. To this end, we recommend the Department clarify that parties—be they plan administrators, plan fiduciaries, or other service providers—would not face potentially increased risks as a result of combining notices. For example, the Department should clarify that if the portion of a combined notice pertaining to a given disclosure/notice requirement were found to be deficient, this failure would not impact the sufficiency of other portions of the combined notice.
- Second, we recommend the Department take a broader approach in considering the consolidation of additional notices, as expressly provided for in section 341. To the extent that multiple notices can be combined into a consolidated notice, as opposed to being furnished to participants and beneficiaries as multiple separate notices, we believe there is a greater likelihood that participants would read them.

7. Eliminating Unnecessary Plan Requirements Related to Unenrolled Participants.

ICI supports efforts to reduce unnecessary communications regarding retirement plans. To that end, section 320 of the SECURE 2.0 Act eliminates unnecessary notices and disclosures to eligible employees who do not participate in an individual account plan. While we do not have any specific comments on questions 14 through 18 of the RFI, as a general matter we urge the Department to exercise caution in adding requirements that may increase the burden on those sending the remaining required 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 section 320 to reduce unnecessary costs of plan administration.

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ICI looks forward to working with you to implement the many positive changes for retirement savers included in the SECURE 2.0 Act, as well as the studies and reports Congress has directed the Department to complete. In addition to the items included in the RFI, we would be pleased to provide input on other SECURE 2.0 Act provisions, such as the establishment of a Retirement Savings Lost and Found. If we can provide you with any additional information regarding these issues, please do not hesitate to contact Elena Chism at 202/326-5821 (elena.chism@ici.org), Shannon Salinas at 202/326-5809 (shannon.salinas@ici.org), or David Cohen at 202/326-5361 (david.cohen@ici.org).

Sincerely,

/s/ Elena Barone Chism	/s/ Shannon Salinas	/s/ David Cohen
Elena Barone Chism Deputy General Counsel- Retirement Policy	Shannon Salinas Associate General Counsel- Retirement Policy	David Cohen Associate General Counsel- Retirement Policy