April 25, 2023

Delivered via email

Lisa Gomez
Assistant Secretary
Employee Benefits Security Administration
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: The SPARK Institute's SECURE 2.0 Guidance Requests

Dear Ms. Gomez:

On behalf of the SPARK Institute, Inc., we are writing to request guidance from the Department of Labor (DOL) on the SECURE 2.0 Act of 2022 (SECURE 2.0). The SPARK Institute was very pleased to see SECURE 2.0 signed into law at the end of last year, as it delivers on many of the retirement reforms and enhancements that have long been priorities for the SPARK Institute.

The SPARK Institute represents retirement plan recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms, and investment managers. Collectively, our member firms administer the retirement plans for over 100 million American workers.

SPARK's members are already working hard to understand and implement all of the changes included in SECURE 2.0, and we are very optimistic about the ways in which SECURE 2.0 will help all Americans better prepare for and maintain financial security in retirement. We also know that DOL, like our members, has similarly been working very hard to understand the bill's dozens of provisions, prioritize regulatory needs, and issue guidance on the most pressing issues created by SECURE 2.0. In this regard, the SPARK Institute appreciates all of DOL's efforts to ensure that SECURE 2.0 achieves its intended policy goals. Additionally, we appreciate the SECURE 2.0 guidance that has already been issued by DOL, most notably the recent Form 5500 revisions that, in accordance with Section 345 of SECURE 2.0, omit any trust-level audit for defined contribution groups filing a single Form 5500.

As DOL continues to develop its SECURE 2.0 regulatory priorities and consider the actual terms of any guidance, we encourage you to reach out to the SPARK Institute if we can be of any assistance. Additionally, to assist with your prioritization and drafting efforts, we have included below a list of guidance requests that our members have identified as needing clarification or confirmation from DOL.

A. Clarification of PEP Trustee Duties (105)

SECURE 2.0: Prior to SECURE 2.0, a plan could only qualify as a pooled employer plan (PEP) if the plan: (1) designated one or more trustees to be responsible for collecting contributions to the plan, and (2) required such trustees to implement written contribution collection procedures. Section 105 of SECURE 2.0 changed this requirement so that, beginning in 2023, any named fiduciary (other than an employer in the PEP) may be designated as having responsibility for the collection of contributions to the plan and for implementing written contribution collection procedures. In addition, there is no longer a requirement that the PEP have a trustee who could serve as an IRA trustee under section 408(a) of the Internal Revenue Code (Code).

Guidance Request:

- ***Updated Form PR.*** In order to qualify as a PEP, the pooled plan provider (PPP) must report certain information about itself and the PEP on Form PR. If any information on the Form PR changes, supplemental filings must be made within the later of 30 days after the calendar quarter in which the specified reportable event occurred or 45 days after the actual event. Under the current version of Form PR, the PEP's trustee must be reported on Line 7(c). The SPARK Institute requests that DOL update and provide guidance on the Form PR to reflect the fact that a named fiduciary, rather than a trustee, may now be responsible for contribution collection procedures and that a PEP may be invested solely in annuities and may not have a trust.

B. Pension-Linked Emergency Savings Account (127)

SECURE 2.0: Section 127 of SECURE 2.0 creates a new in-plan emergency savings feature for non-highly compensated employees called a pension-linked emergency savings account (PLESA). Section 127 applies to plan years beginning after December 31, 2023.

Guidance Request:

- ***Coordination with IRS.*** Many of the substantive conditions for offering a PLESA appear in both ERISA and the Code. Accordingly, the SPARK Institute requests that IRS and DOL coordinate on any guidance related to PLESAs, and that any PLESA guidance be issued jointly by both regulators. We recommend that guidance from DOL and IRS on the PLESA rules be released at the same time. It would be disruptive if one regulator issued guidance while we await guidance from the other.

- ***Flexibility is Critical.*** The SPARK Institute is pleased that Congress has created a new tool that enables employers to use their retirement plans to help employees save for emergencies; and by proving this safety valve for emergency expenses, we are hopeful that this new feature will encourage long-term retirement savings. This new option, however, includes a series of complex rules that will require new system builds and coordination among employers, recordkeepers, payroll providers, and consultants. Given this complexity, and in an effort to see this new option adopted by a significant number

of employers, we are urging the Department to provide maximum flexibility to employers, participants, and service providers in terms of how the new PLESA option may be designed and operated.

For example, when producing the lifetime income illustration (LII) that plan administrators must annually furnish to defined contribution plan participants as part of ERISA's pension benefit statement requirement, DOL should not require plans to carve out the value of any PLESA from the account balance that is used to calculate the LII. Otherwise, service providers who have invested substantial resources to operationalize the new LII requirement would have to rebuild their new systems for creating those projections.

New ERISA section 801(c)(1)(B) authorizes DOL to impose "reasonable restrictions" on any PLESA. At this time, we can think of no reasonable restrictions that are needed beyond what is already described in the statute, and urge DOL not to unnecessarily add any conditions that could potentially dissuade employers from adopting this new feature or make it more expensive. We would have concerns, for instance, if DOL were to impose restrictions on how a PLESA may distribute funds to participants (e.g., via check, debit card, or ACH transfer). We would also be concerned if there were any restrictions, other than any restrictions already imposed by the statute, on how and when a participant could transfer amounts from the PLESA to the regular potion of a participant's account.

New ERISA section 802 preempts any state law that could restrict the use of automatic enrollment in connection with a PLESA and authorizes DOL to promulgate rules to establish minimum standards that would need to be satisfied in order to qualify for preemption. At this time, we can think of no additional standards beyond the conditions of the statute itself that should be needed in order to qualify for preemption. The statute already contains a number of minimum standards, which should be sufficient for preemption to apply.

In a similar regard, new ERISA section 802 instructs DOL to prescribe regulations "as may be necessary" to address reporting and disclosure requirements for PLESAs. Beyond what is already contemplated by the statutory text of SECURE 2.0, we do not see any need for DOL to add reporting and disclosure requirements. For example, new ERISA section 801(d)(3) already specifies, in detail, the information that must be furnished to participants before any contributions may be made to a PLESA. With respect to the Form 5500, we think it would be sufficient for the assets of the PLESA to be included with the other assets on Schedule H or Schedule I, as applicable. If the DOL feels a need to know if a plan offers a PLESA, a new code could be added to Line 8a. Other than that, we see no need for additional complex reporting on Form 5500. In any event, if there will be new reporting and disclosure requirements, plans and providers need to know what they will be before making the decision to build the systems to implement PLESAs.

C. Recovery of Retirement Plan Overpayments (301)

SECURE 2.0: Section 301 of SECURE 2.0 generally allows plan fiduciaries to decide not to recoup overpayments that were mistakenly made to participants. If plan fiduciaries choose to recoup overpayments, limitations on the amount and manner of the recoupment apply to protect participants. Section 301 of SECURE 2.0 generally applies on the date of enactment, with special provisions addressing fiduciary decisions made prior to enactment.

Guidance Request:

- ***Fiduciary Decisions Prior to Enactment.*** The SPARK Institute requests guidance confirming that Section 301 of SECURE 2.0 does not require plan fiduciaries to reconsider or adjust any aspect of an overpayment recoupment that commenced prior to December 29, 2022. In this regard, we do not believe that Congress intended for the limitations described in newly added ERISA section 206(h)(4) to impact fiduciary decisions and overpayment recovery efforts that commenced prior to the date of enactment. Because those new limitations apply upon the exercise of a fiduciary's discretion and Section 301 of SECURE 2.0 generally applies as of the date of enactment, we do not believe that the new limitations should apply to any exercise of fiduciary discretion that occurred prior to the date of enactment or any non-discretionary recovery efforts implementing those fiduciary decisions prior to or after the date of enactment.

- ***Fiduciary Decisions Following Enactment.*** The SPARK Institute requests confirmation that the fiduciary relief in Section 301 of SECURE 2.0 is available for a fiduciary that decided, prior to the date of enactment, to recoup an inadvertent overpayment from a participant, and following the date of enactment, decided to discontinue any recovery efforts involving the impacted participant.

- ***Participant and Beneficiary Culpability.*** New ERISA section 206(h)(5) indicates that nearly all of the new fiduciary limitations on recouping overpayments do not apply to a participant or beneficiary who is "culpable." The statute indicates that an individual is culpable if he or she "bears responsibility for the overpayment" or knew the payments were materially in excess of the correct amount. However, an individual is not culpable merely because the individual believed the benefit payment or payments were or might be in excess of the correct amount, if the individual raised that question with an authorized plan representative and was told the payment or payments were not in excess of the correct amount. The SPARK Institute is requesting guidance on whether this "culpability" standard will be a facts and circumstances determination, or will it be determined exclusively based on the criteria enumerated in ERISA section 206(h)(5).

- ***Overpayments Resulting from Late Death Notification.*** There are, at a very high-level, two types of overpayments: (1) those resulting from a late notification of death; and (2) those not resulting from a late notification of death (e.g., bad data, calculation error, etc.). Following a participant's death, SECURE 2.0's new recoupment restrictions could make it very difficult to recoup annuity overpayments that were due to a late notification of a

participant's death. For example, the new limitation prohibiting a fiduciary from annually seeking more than 10% of the overpayment of a non-decreasing annuity creates substantial challenges if a fiduciary is trying to recoup an overpayment from a deceased participant's estate. To address these problems, the SPARK Institute requests guidance indicating that the carve-out for culpable participants and beneficiaries applies when an overpayment is attributable to a participant's or beneficiary's estate failing to notify the plan of a death. Otherwise, such an estate may need to remain open for many years before a plan can recoup an overpayment that could only be avoided through the timely notification of the participant's or beneficiary's death.

In addition, the SPARK Institute requests guidance on whether there are situations where overpayments to a participant due to late notification of a participant's death can be recouped from the participant's beneficiary. For example, where a participant who is receiving a joint and 50% survivor annuity with a spousal beneficiary has direct deposit into a joint account with his spouse, and the spouse does not notify the plan of the participant's death for a period of time, can the overpayments be recouped from the spousal beneficiary?

- ***Recoupment from Plan Sponsors.*** Section 301 of SECURE 2.0 adds a new Section 206(h) to ERISA providing a fiduciary safe harbor for not recouping overpayments. New Section 206(h)(1)(B)(ii) permits a fiduciary to not recoup an overpayment from a plan sponsor of a defined benefit plan subject to minimum funding rules, provided that failure to recover all or part of the overpayment does not materially affect the plan's ability to pay benefits (the "materiality clause"). New Section 206(h)(1)(C) permits a fiduciary to not recoup an overpayment from a defined benefit plan from a plan fiduciary (including a plan sponsor) provided certain conditions are met, but does not include the "materiality clause". The SPARK Institute requests clarification on whether a decision not to recoup an overpayment from a plan sponsor can be made under new Section 206(h)(1)(C) even if such decision could not be made under new ERISA Section 206(h)(1)(B)(ii) because (1) the plan is subject to minimum funding requirements, and (2) it would not meet the "materiality clause" under that section.

D. Unenrolled Participant Disclosures (320)

<u>SECURE 2.0:</u> Section 320 of SECURE 2.0 generally exempts defined contribution plans from furnishing disclosures and notices that are otherwise required to be furnished to unenrolled participants, if certain conditions are satisfied. Section 320 of SECURE 2.0 applies to plan years beginning after December 31, 2022.

<u>Guidance Request:</u>

- ***Regulatory Coordination.*** Because the ERISA and Code relief in Section 320 of SECURE 2.0, and the conditions for such relief, involve issues that are within IRS's and DOL's jurisdiction, the SPARK Institute requests that IRS and DOL coordinate on

regulatory guidance implementing this relief and that any guidance be issued jointly by both regulators.

- ***Unenrolled Participant Definition.*** The exemption described in Section 320 of SECURE 2.0 is available with respect to employees who are "eligible to participate in a defined contribution plan," but are "not participating in such plan." The SPARK Institute requests clarification on which employees are in this group. Is it any employee who is eligible to participate in a defined contribution plan who has an account balance of zero?

  For example, if a rehired employee who is eligible to participate previously contributed to the plan, but subsequently withdrew his or her entire account, would such employee be treated as participating in the plan? It would appear that such an individual would not currently be participating in the plan.

- ***List of Notices Related to Eligibility.*** As a condition for relief under Section 320 of SECURE 2.0, an unenrolled participant must be furnished with the summary plan description and any other notices "related to eligibility" under the plan that are required to be furnished under ERISA or the Code in connection with the participant's initial eligibility under the plan. The SPARK Institute requests guidance identifying the list of notices that may be "related to eligibility" in connection with a participant's initial eligibility under the plan.

- ***Other Criteria for Relief.*** In addition to providing certain notices to unenrolled participants when they first become eligible, the relief under Section 320 of SECURE 2.0 is also conditioned upon any unenrolled participant satisfying "such other criteria" that the Labor Secretary and Treasury Secretary may determine appropriate. The SPARK Institute requests guidance indicating that the relief under Section 320 of SECURE 2.0 is available before DOL and/or Treasury issue guidance specifying any other criteria for relief.

E. PAPER STATEMENTS AND E-DELIVERY MODIFICATIONS (338)

SECURE 2.0: Beginning in 2026, Section 338 of SECURE 2.0 will add a new paper statement requirement for retirement plans that do not use one of the 2002 e-delivery safe harbors (i.e., the "affirmative consent" or "wired at work" safe harbor) to deliver benefit statements to participants.

Section 338 of SECURE 2.0 also adds two additional categories of changes impacting DOL's existing e-delivery rules: (1) a new one-time initial paper notice for participants receiving benefit statements in accordance with DOL's 2002 safe harbors; and (2) a series of regulatory directions for DOL to update its electronic disclosure guidance (other than the 2002 safe harbors) to the extent necessary to ensure that DOL's document delivery guidance satisfies a series of standards specified in the bill.

<u>Guidance Request:</u>

- ***Various Regulatory Directions.*** Section 338(b)(2) of SECURE 2.0 directs DOL to update its electronic disclosure guidance (other than the 2002 safe harbors) to the extent necessary to ensure that DOL's document delivery guidance satisfies a series of specifications enumerated in the bill. In implementing this direction, the SPARK Institute urges DOL not to make changes if they would, in fact, not be necessary to achieve the specifications in Section 338(b)(2). In this regard, the SPARK Institute believes that DOL does not need to issue additional guidance to accomplish the regulatory specifications in Section 338(b)(2) because they 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 DOL's 2020 e-delivery safe harbors, such as the rule prohibiting fees for the delivery of paper statements.

- ***Alternative Notice for DB Plans.*** Section 105(a)(1)(B) of ERISA, which was unchanged by SECURE 2.0, requires defined benefit plans to deliver a pension benefit statement to participants once every three years. Section 105(a)(2) of ERISA, which was amended by SECURE 2.0, specifies how the pension benefit statements required by Section 105(a)(1)(B) must be delivered. For example, new ERISA section 105(a)(2)(E), as added by SECURE 2.0, requires defined benefit plan participants to receive at least one of the pension benefit statements described in ERISA section 105(a)(1)(B) in paper every three years.

  Importantly, SECURE 2.0 did not amend the ERISA provision that separately permits defined benefit plans to be treated as meeting the benefit statement requirement of ERISA section 105(a)(1)(B)(i) by annually providing participants with a notice of the availability of the pension benefit statement. Accordingly, the SPARK Institute requests guidance clarifying that SECURE 2.0's changes did not eliminate or change this "alternative notice" method, and therefore, defined benefit plans can rely exclusively on this alternative notice method to comply with ERISA section 105(a)(1)(B)(i).

F. ROTH CATCH-UP CONTRIBUTIONS (603)

<u>SECURE 2.0:</u> Beginning in 2024, individuals with FICA wages in excess of $145,000 may only make catch-up contributions to a 401(k) plan or 403(b) plan as designated Roth contributions.

<u>Guidance Request:</u>

- ***Preemption for Negative Consent.*** Most plans do not require participants who are already making contributions to affirmatively elect to continue making those contributions at the start of each year. For example, once a participant election to defer a specific dollar amount or percentage of compensation is made, employers and plans will implement that election until a plan or Code limit is reached. This includes, for example,

current elections by participants to make elective deferrals up to the regular deferral limit, plus any increase for catch-up contributions.

To the extent needed to comply with SECURE 2.0's new Roth requirement for catch-up contributions, employers and plan administrators are considering the use of negative consent to automatically switch an employee's existing election to make pre-tax contributions so that they would newly be made as designated Roth contributions. The SPARK Institute believes that, for employers and plans who take this approach, ERISA should preempt any state wage withholding laws that could otherwise be applied to prevent the use of negative consent in this instance. Accordingly, we request that DOL issue guidance confirming that ERISA preempts state wage withholding laws in this way. Participants who are catch-up eligible and have made any election that will result in contributions exceeding the regular contribution limit should not be required to affirmatively elect to have catch-up contributions made to a designated Roth account, provided that any affected participants are given appropriate notice and an opportunity to change the default.

G. ERISA Safe Harbor for 403(b) Plans (101 / 106 / 121)

SECURE 2.0: Subject to special grandfathering relief, beginning in 2025, Section 101 of SECURE 2.0 requires 403(b) plans to automatically enroll participants at a minimum initial rate of 3% of compensation (maximum 10%), subject to exceptions. Separately, Section 121 of SECURE 2.0 grants certain relief to 403(b) plans that are designed as "safe harbor deferral-only plans." As a condition for this relief, the employer must automatically enroll employees at a default contribution rate of no less than 3% of compensation.

Section 106 of SECURE 2.0 includes changes to the Internal Revenue Code that clarify that an arrangement will not fail to be treated as a 403(b) plan solely by reason of being maintained by more than one employer. Section 106 of SECURE 2.0 also includes ERISA relief that permits 403(b) plans maintained as a PEP to be treated as a single plan for purposes of ERISA.

Guidance Request:

- ***Automatic Enrollment.*** Labor Regulation section 2510.3-2(f) includes a safe harbor under which a 403(b) plan will not treated as a "pension plan" that is subject to ERISA. Among other conditions, the safe harbor requires any employee participation to be "completely voluntary." The SPARK Institute requests guidance clarifying whether a 403(b) plan that is subject to, or designed in accordance with, the new automatic enrollment requirements of Section 101 and/or Section 121 of SECURE 2.0 may rely on the safe harbor described in Labor Regulation section 2510.3-2(f).

- ***403(b) MEPs.*** The SPARK Institute requests guidance clarifying whether there may be circumstances in which a 403(b) multiple employer plan maintained for the employees of tax-exempt employers may rely on the safe harbor described in Labor Regulation section 2510.3-2(f).

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Thank you for your consideration of our requests. If you have any questions or would like more information regarding our requests, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com).

Sincerely,

Tim Rouse
Executive Director