October 10, 2023

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: SECURE 2.0 Reporting and Disclosure RFI (RIN 1210-AC23)

Dear Sir or Madam:

On behalf of the SPARK Institute, Inc., we are writing in response to the Department of Labor's ("the Department's") August 11, 2023 request for information ("RFI") regarding reporting and disclosure issues arising out of the SECURE 2.0 Act of 2022 ("SECURE 2.0").

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 110 million American workers.

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 previously submitted a SECURE 2.0 guidance request to the Department on April 25, 2023. To the extent that our April letter addresses issues covered by the RFI, we have reiterated those requests in our responses below.

A. 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 includes two additional categories of changes impacting the Department's existing e-delivery rules. First, for participants receiving benefit statements in accordance with the Department's 2002 e-delivery safe harbors, plan administrators must now send a new one-time initial paper notice informing participants "of their right to request that all documents required to be disclosed under [ERISA] be furnished on paper in written form."

Second, Section 338 includes a series of regulatory directions for the Department to update its electronic disclosure guidance (other than the 2002 safe harbors) to the extent necessary to ensure that the Department's document delivery guidance satisfies a series of standards specified in SECURE 2.0.

Electronic Delivery Improves Participant Outcomes. Before responding to the RFI's specific questions regarding e-delivery, we believe it is necessary to first put the Department's existing e-delivery safe harbors and Section 338 of SECURE 2.0 in context.

For many years, the SPARK Institute has advocated for legislative and regulatory changes that promote the use of e-delivery. This advocacy is rooted in our belief that e-delivery makes retirement notices and disclosures more effective, more useful, and less costly for retirement savers. For example, a 2019 study conducted by Quantria Strategies estimated that $250 to $450 million in savings would annually accrue directly to participants by permitting plan administrators to deliver notices and disclosures electronically by default, which the Department eventually permitted in 2020.[1] That same study estimated that these cost savings could increase a participant's retirement savings by nine percent during the accumulation phase, due to an increase in their net investment returns resulting from reduced costs from electronic delivery of regulatory documents.[2]

Research also shows that electronic delivery improves participant outcomes in terms of savings rates and participant engagement, independent of any cost savings directly attributable to reduced printing, mailing, and storage costs.[3] This is because participants who access plan disclosures electronically can more easily be directed to online tools and other resources that help them: (i) understand the adequacy of their savings; (ii) plan to make improvements; and (3) immediately take action in pursuit of their goals. Other advantages that electronic delivery has over paper delivery include the ability for participants to access information regarding their accounts in real time, the ability to reduce missing participant issues by providing participants uninterrupted access to their documents when they change physical addresses, and additional levels of cybersecurity for participants who register their accounts and enable multi-factor authentication. Ultimately, the many benefits of e-delivery have improved outcomes for millions of Americans who work hard to save for a financially secure retirement.

In 2002, as part of a government-wide effort to modernize rules to reflect advances in technology, the Department published two e-delivery safe harbors – the "affirmative consent" and "wired at work" safe harbors. For more than two decades, these two safe harbors have worked well, in part, because they include regulatory safeguards that require plan administrators to implement measures reasonably calculated to ensure the actual receipt of electronically delivered documents, in addition to always honoring any participant's preference for paper delivery.

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[1] Quantria Strategies, *Default Electronic Delivery Works: Evidence of Improved Participant Outcomes from Electronic Delivery of Retirement Plan Documents* (November 2019), at 2.

[2] *Id.*

[3] *Id.*

Building on its 2002 "affirmative-consent" and "wired-at-work" safe harbors, in 2020, the Department finalized a pair of new e-delivery safe harbors – the "notice-and-access" and "direct email" safe harbors. These new safe harbors appropriately expanded the universe of participants who may receive electronically delivered documents by default and were intended to promote the many benefits of e-delivery, while also incorporating a series of regulatory safeguards to ensure that plans are delivering documents in accordance with participant preferences. The 2020 safe harbors were adopted in large part due the public's increased comfort with conducting financial transactions online and the progress that has been made since 2002 in terms of improved internet access, especially among retirement plan participants.[4]

The regulatory safeguards incorporated into the 2020 safe harbors operate at the time electronic delivery commences and on an ongoing basis. For example, the Department's 2020 safe harbors condition relief upon plan administrators furnishing a one-time paper notice to any covered individuals who will be receiving documents electronically. This paper notice must inform the recipient that covered documents will be furnished electronically, identify the electronic address that will be used, provide any instructions necessary to access covered documents, and inform recipients of their rights to receive documents in paper free of charge. Similar notices are also sent electronically to participants each time that documents are posted online. All of these notices and safeguards empower participants to monitor and manage their delivery preferences. Additionally, the 2020 safe harbors require plans to implement systems that alert administrators of invalid email addresses and to take additional measures to ensure the continued accuracy and availability of electronic addresses when employees terminate employment.

The point of all of this is to say that the Department's existing e-delivery framework has struck the right balance by fostering the use of e-delivery and all of its associated benefits, while also incorporating regulatory safeguards that ensure participants can access their documents, are given the right to request paper, and are given timely notices about how to exercise that right. Because this existing framework strikes the right balance, the SPARK Institute strongly encourages the Department, in reviewing its e-delivery guidance, to only make those changes that are absolutely necessary to implement SECURE 2.0's directions. Any additional changes to the Department's existing rules would threaten to disrupt a system that has worked well, and will continue to work well, for plans and participants.

Any additional changes would also contradict the general message conveyed to the Department in response to its RFI by one of SECURE 2.0's primary drafters – the Chairwoman of the House Committee on Education and the Workforce, Virginia Foxx. In her October 5, 2023 letter to the Department, Chairwoman Foxx cautioned the Department against taking regulatory action that

[4] A 2015 telephone survey conducted by Greenwald & Associates for the SPARK Institute found that 99 percent of retirement plan participants reported having internet access at home or work and 88 percent of respondents reported accessing the internet on a daily basis. That study also found that 84 percent of plan participants find it acceptable to make electronic delivery the default option, with the option to opt out at no cost to the participant.

goes "well beyond the provisions of section 338" and reminded the Department that "Congress' directives to the Secretary of Labor in section 338 are clear, specific, and intentionally limited."[5]

SPARK Opposes "Access in Fact" Standards for Electronic Delivery. Question 21 of the RFI asks whether the Department's 2002 and 2020 e-delivery safe harbors should "be modified such that their continued use by plans is conditioned on access in fact." In this regard, the RFI asks whether plan administrators should be required to monitor whether individuals actually visit or log into plan websites, and, in the event that such individuals are not viewing their documents, should the e-delivery safe harbors require plan administrators to revert participants to paper.

The SPARK Institute strongly opposes any regulatory standard that would newly condition any of the Department's e-delivery safe harbors upon a participant actually accessing or reading any ERISA-required notice or disclosure. Such a standard would undermine, diminish, and reverse the many benefits created by e-delivery and significantly increase the costs incurred by plans that use e-delivery. For example, a participant who regularly checks their account balances and investment allocation in real time through electronic recordkeeping systems may be less inclined to regularly check the standardized notices and disclosures that are required by ERISA. Especially for these participants, we see no reason that plans should incur additional costs to monitor their activity and revert them to paper if they are not actually viewing ERISA's standardized notices and disclosures.

Furthermore, such a standard would unfairly impose onerous conditions on e-delivery systems that are not similarly imposed on paper delivery systems. To be blunt, imagine if we required plan administrators to go to a participant's house and check to make sure their mail is opened.[6]

The Department has already and recently considered and rejected an "access in fact" standard, as part of its 2020 e-delivery rulemaking. In reaching this conclusion, the Department: (a) cited how the costs associated with access in fact would far outweigh its benefits; and (b) pointed to the fact that the regulatory safeguards included in the 2020 safe harbors are "more than reasonably calculated to ensure actual receipt of covered documents."[7]

Another reason we oppose any requirement that would revert participants to paper if they are not actually viewing their electronic notices and disclosures is because it could result in plans sending documents through a medium that is different from the medium that a participant

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[5] Letter from Chairwoman of the House Committee on Education and the Workforce, Virginia Foxx, to the Assistant Secretary of the Employee Benefits Administration (Oct. 5, 2023).

[6] The SPARK Institute was pleased to see a similar concern and sentiment expressed in the recent letter sent to the Department by Chairwoman Foxx, which stated, "To require a plan administrator to monitor electronic access is as ridiculous as requiring a plan administrator to confirm that a participant opens and reads paper mail. This is an insult to participants and gross regulatory overreach."

[7] 85 Fed. Reg. 31884, 31900 (May 27, 2020) ("The Department does agree, however, that imposition of a monitoring requirement could be very expensive, especially for small plans, to the extent technological systems have to be replaced or altered significantly, or additional, potentially costly, plan services have to be procured. 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.").

expressly requested or was informed about. For example, if a participant affirmatively opts to receive documents electronically and also chooses not to periodically review plan notices and disclosures, the participant should not have their preferences and expectations disregarded by reverting them back to paper. The impact of such a switch would be particularly concerning when participants move, are away from their principal residences, or otherwise rely exclusively on electronic communications to handle plan matters.

The idea of "access in fact" rests on two false premises. The first false premise is that somehow delivering documents electronically is inherently less favorable to participants and thus the plan should "revert" to paper when a participant fails to access the document. We reject this premise. For example, one very important advantage of electronic documents is that if the participant does not access them, they do not immediately disappear. In contrast, if a participant does not open an envelope from the plan, or opens it and then immediately discards it, the document is lost. The second false premise is the idea that it should be the responsibility of the plan administrator to ensure that participants read every single word of every single regulatory notice that ERISA requires to be sent. If a participant makes the choice to ignore or file away the benefit statement that they receive by mail or email to review later, the participant made the choice. At least, in the case of participants making this choice for electronically delivered documents, the statements will be posted online for participants to access and review, as required. Such a choice should not create additional obligations for plan administrators.

The Department Should Not Add Regulatory Conditions to the 2002 E-Delivery Safe Harbors. Section 338(b)(1) of SECURE 2.0 directs the Department to update its 2002 e-delivery safe harbors to condition relief upon the plan administrator sending a one-time initial notice of the participant's or beneficiary's "right to request that all documents required to be disclosed under [ERISA] be furnished on paper in written form." This requirement is similar, but not identical, to the one-time initial paper notice that must be sent in order to rely on the Department's 2020 e-delivery safe harbors. Question 19 of the RFI asks "whether any additional information (other than a statement of the right to request that all documents required to be disclosed under ERISA be furnished on paper in written form) should be included, and whether there are other standards that should apply to the required one-time initial paper notice that must be furnished for compliance with 29 CFR 2520.104b–1(c), the 2002 safe harbor?"

The SPARK Institute opposes any regulatory action that would impose additional conditions on the 2002 e-delivery safe harbors, beyond what is expressly required by Section 338(b)(1) of SECURE 2.0. The 2002 safe harbors have worked well for more than 20 years and include appropriate safeguards that ensure participants are aware of their rights and are receiving documents how they are most comfortable. The Department should not be increasing document delivery costs by adding new conditions to the 2002 safe harbors, especially in the absence of any evidence suggesting that the 2002 safe harbors are failing to ensure that participants can access their plan-related documents.

While SECURE 2.0 directs the Department to add the notice described in Section 338(b)(1), it also directs the Department ***not*** to take additional action with regard to the 2002 e-delivery safe harbors. Relevantly, Section 338(b)(2) of SECURE 2.0 includes a series of regulatory directions

for the Department to update its electronic disclosure guidance, ***other than the 2002 safe harbors***, to the extent necessary to ensure that such guidance satisfies a series of standards specified in SECURE 2.0. If Congress had wanted the Department to make changes to the 2002 safe harbors, beyond what is directed in Section 338(b)(1), it would not have excluded the 2002 safe harbors from the regulatory directions described in Section 338(b)(2).

To the extent that the Department issues guidance interpreting the new notice required by Section 338(b)(1) of SECURE 2.0, the SPARK Institute requests clarification that, if a participant receives documents in accordance with the 2020 e-delivery safe harbors and has already received a one-time initial paper notice pursuant to Labor Reg. § 2520.104b-31(g), an additional one-time paper notice is not required in order to newly deliver documents to the participant in accordance with the Department's 2002 affirmative consent or wired at work safe harbors since the participant will already have been notified in the initial paper notice (and in notices of internet availability) of the participant's right to receive all notices in paper.

The Department Should Not Substantively Change Pension Benefit Statements. Question 20 of the RFI asks, "[t]o what extent should [pension benefit statements] contain the content of the initial paper notification described in paragraph (g) of the 2020 safe harbor, and why?" Thus, if such a change were adopted, benefit statements would newly be required to include the following information: (1) notification that covered documents will be furnished electronically to an electronic address; (2) identification of the electronic address that will be used for the individual; (3) instructions necessary to access the covered documents; (4) 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; (5) 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 (6) 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.

The SPARK Institute opposes any regulatory change that would require this type of information to be furnished to participants as part of the pension benefit statement because it is ***beyond the scope*** of SECURE 2.0's e-delivery provisions and would contradict the intent of SECURE 2.0. Additionally, for benefit statements that are delivered in paper, this information would not be relevant; and for benefit statements delivered in accordance with the 2020 e-delivery safe harbors, much of this information will unnecessarily repeat disclosures that are simultaneously provided as part of the notice of internet availability required by Labor Reg. § 2520.104b-31(d) or the direct email disclosures required by Labor Reg. § 2520.104b-31(k)(2).

Section 338 of SECURE 2.0 addresses the media that plans may use to deliver ERISA-required notices and disclosures, including the media that plans may use to deliver pension benefit statements. Section 338 does not, however, call for substantive changes to the information that is presented on pension benefit statements. Accordingly, any change to the information presented on pension benefit statements is beyond the scope of Section 338 of SECURE 2.0.

The SPARK Institute is also concerned about regulatory changes that would require new information to be presented on pension benefit statements because it would contradict the intent of SECURE 2.0's provisions that are designed to simplify, standardize, improve, and consolidate ERISA's reporting and disclosure rules.[8] In recent decades, the amount of disclosures that retirement plan participants receive has significantly increased and contributed to disclosure fatigue. Participants have become numb to overly detailed disclosures and it is too difficult for participants to identify and understand the information that is most relevant to them. Regulatory changes adding unnecessary detail to the pension benefit statement, such as detailed disclosures on document delivery preferences, would only contribute to these issues and is contrary to the SECURE 2.0 provisions seeking to simplify, standardize, improve, and consolidate ERISA's reporting and disclosure rules.

In this regard, the SPARK Institute believes that adding information about document delivery preferences to the benefit statement would also dilute the overall purpose of having a concise benefit statement that provides a benefit "snapshot" to participants. As the benefit statement gets longer and longer, participants will more likely become overwhelmed by or ignore information provided through the benefit statement. Thus, the additional information contemplated by the RFI would also appear to be in tension with the apparent objective of Section 338 of SECURE 2.0 – i.e., to get participants to review and understand the contents of their benefit statement.

No Changes Are Needed to the 2020 E-Delivery Safe Harbors. The RFI asks, "What modifications or updates to the 2020 safe harbor are needed to implement section 338 of SECURE 2.0?"

Section 338(b)(2) of SECURE 2.0 directs the Department to update its electronic disclosure guidance (other than the 2002 safe harbors) to the extent necessary to ensure that the Department's document delivery guidance satisfies a series of specifications enumerated in the SECURE 2.0. In implementing this direction, the SPARK Institute urges the Department 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 the Department 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 the Department's 2020 e-delivery safe harbors, such as the rule prohibiting fees for the delivery of paper statements.

B. UNENROLLED PARTICIPANT DISCLOSURES (320)

SECURE 2.0. Section 320 of SECURE 2.0 generally exempts defined contribution plans from furnishing disclosures and notices that are otherwise required to be furnished to an unenrolled

[8] *See* Section 319 of SECURE 2.0 (directing the Department to review and report to Congress on ways to consolidate, simplify, standardize, and improve ERISA's reporting and disclosure rules); Section 341 of SECURE 2.0 (directing the Department to issue regulations providing that a plan may consolidate a series of defined contribution plan notices into a single notice).

participant, provided that an unenrolled participant is furnished with: (1) an annual reminder notice of such participant's eligibility to participate in such plan and any applicable election deadlines under the plan; and (2) any document requested by such participant that the participant would be entitled to receive notwithstanding the relief provided by Section 320. Section 320 of SECURE 2.0 applies to plan years beginning after December 31, 2022.

The Department Should Not Limit the Unenrolled Participant Definition. Section 320 of SECURE 2.0 defines an "unenrolled participant" to mean an employee who: (1) is eligible to participate in an individual account plan; (2) has been furnished with the summary plan description ("SPD") and any other notices related to eligibility; (3) is not participating in such plan; and (4) satisfies such other criteria as the Secretary of Labor may determine appropriate.

Question 15 of the RFI asks whether there are additional criteria that the Department should consider for determining who is an unenrolled participant. In response, the SPARK Institute urges the Department not to add any criteria to the statutory definition of "unenrolled participant." We cannot think of any additional conditions that would be beneficial to employees who are unenrolled participants given the statutory provisions that already require that these individuals receive an annual reminder notice and any other disclosures upon request. At it core, the relief in Section 320 of SECURE 2.0 is intended to provide a disclosure exception for employees who have no need for such disclosures because they are not participating in the plan. If additional conditions are added to the unenrolled participant definition, more employees who would not benefit from plan disclosures would be receiving such disclosures and plans would incur unnecessary costs.

Annual Reminder Notice. By statute, the annual reminder notice must notify any unenrolled participant of: "(A) the unenrolled participant's eligibility to participate in the plan; and (B) the key benefits and rights under the plan, with a focus on employer contributions and vesting provisions." Question 16 of the RFI asks whether there is additional information that the Department should consider on the required "annual reminder notice" to unenrolled participants.

The SPARK Institute urges the Department not to add any additional information to the annual reminder notice that is not expressly called for in the statute. For employees who are, by definition, not enrolled in the plan, we believe that the information required for the annual reminder notice by statute is appropriate and exhaustive. Also, unlike the statutory provision expressly authorizing the Department to determine additional criteria for the definition of "unenrolled participant," no similar authorization is included in the statute with regard to the information required on the annual reminder notice.

On the issue of whether DOL should develop a model for the annual reminder notice, there was no consensus among our members. Some supported the idea of a model notice; others opposed it. There was, however, consensus that, regardless of the guidance that DOL issues on the annual reminder notice, it is important for DOL not to publish guidance that will limit the ability of plan sponsors and recordkeepers to communicate in ways that they believe will encourage employees to start contributing. Getting more participants in the plan is in the interest of sponsoring employers and recordkeepers, and they know what works best to promote participation.

Furthermore, our members agreed that the annual reminder notice should avoid overly prescriptive and overly detailed disclosures that could overwhelm employees and potentially discourage them from joining the plan. This is especially the case when considering that the group of employees receiving such notice will already have received and have access to information about the plan and their eligibility.

General Guidance Request. Question 14 of the RFI asks whether there is any guidance that plan administrators would find helpful to implement Section 320 of SECURE 2.0. Much of our response to this question below reiterates the relevant guidance requests that the SPARK Institute sent to the Department earlier this year on April 25, 2023.

- Regulatory Coordination. Because the ERISA and Internal Revenue Code ("Code") relief in Section 320 of SECURE 2.0, and the conditions for such relief, involve issues that are within Internal Revenue Service's ("IRS's") and the Department's jurisdiction, the SPARK Institute requests that IRS and the Department coordinate on regulatory guidance implementing this relief and that any guidance be issued jointly by both regulators.

- Unenrolled Participant. Our April 2023 letter requested clarification on which employees are considered to "be eligible to participate" but "not participating in such plan." 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 and has not restarted participation, would such employee be treated as participating in the plan? It would appear that such an individual would be considered to not be participating in the plan.

- SPD & 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 SPD 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. Additionally, we are requesting clarification on whether SECURE 2.0's relief for unenrolled participants is conditioned on a plan delivering a restated SPD or SMM to this group of participants after their initial eligibility.

C. Pension Linked Emergency Savings Accounts (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.

General Guidance Request. Question 7 of the RFI ask what guidance, if any, do plan administrators need to effectively implement the requirements of Section 127 of SECURE 2.0. Much of our response to this request below reiterates the relevant guidance requests that the SPARK Institute sent to the Department earlier this year on April 25, 2023.

- Coordination with IRS. Many of the substantive conditions for offering a PLESA appear in both ERISA and the Code; other provisions appear only in the Code or only in ERISA, but they are all interconnected. Accordingly, the SPARK Institute requests that IRS and the Department coordinate on any guidance related to PLESAs, and that any PLESA guidance be issued jointly by both regulators. We recommend that guidance from the Department 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.[9]

  As an example, in both ERISA and the Code, there is a provision stating that no contribution shall be accepted to a PLESA to the extent such contribution would cause the portion of the account balance attributable to participant contributions to exceed the lesser of $2,500 or an amount determined by the plan sponsor. In our April 10, 2023 guidance request to the Department of the Treasury ("Treasury") and IRS, we requested clarification on whether "the portion of the account balance attributable to participant contributions" includes or excludes earnings in a PLESA. Additionally, we requested confirmation that, if a participant with a PLESA account balance in excess of $2,500 takes a PLESA distribution that causes their account to fall below $2,500, the participant can subsequently contribute to a PLESA until the $2,500 limit (or any plan limit) is reached. In short, a critical point to understand is exactly how earnings are to be taken into account, especially after a participant has taken a distribution from a PLESA. This may be, in fact, the most pressing technical question regarding PLESAs. Guidance from the Department that addresses other aspects of the PLESA rules but which does not address this question would be incomplete.

- 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 providing 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

[9] On April 10, 2023, we sent a letter to Treasury and IRS with various guidance requests regarding SECURE 2.0, including a number relating to aspects of the PLESA that would appear to be under their jurisdiction.

ERISA's pension benefit statement requirement, the Department 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 the Department 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 the Department 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 the Department were to impose restrictions on how a PLESA may distribute funds to participants (e.g., via check, debit card, or electronic transfers). 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 portion 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 the Department 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 the Department 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 the Department 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 Department 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.

- PLESA Investments. ERISA section 801(c)(1)(A)(iii) limits the types of investments that may be offered to participants through a PLESA. The SPARK Institute requests clarification that these specific investments may be limited exclusively to the PLESA portion of the plan, and therefore, do not need to be made available for other participant-directed portions of a plan, without causing any fiduciary issues or undermining relief under ERISA section 404(c).

The SPARK Institute also requests guidance clarifying how PLESA investments must be reported for purposes of the participant fee disclosure rules (i.e., the 404a-5 disclosures). For example, must these investments be presented as a "designated investment alternative"? And must the PLESA investment restrictions be described in the disclosure of plan-related information, for example, as "an explanation of any specified limitations on [investment] instructions under the terms of the plan."[10]

D. PARTICIPANT FEE DISCLOSURES (318 & 340)

SECURE 2.0. The Department's participant fee disclosure regulation requires plan fiduciaries to inform participants who have the right to direct the investment of their account about the plan's fees and the investments on the plan menu. This disclosure is commonly referred to as the "404a-5 disclosure."

By December 29, 2025, Section 340 of SECURE 2.0 requires the Department to review and report to Congress on how the participant fee disclosures may be improved to enhance participants' understanding of fees and expenses, as well as the cumulative effect of such fees and expenses on retirement savings over time.

In Section 318 of SECURE 2.0, Congress directed the Department to update its fee disclosure regulation to permit the use of "blended" benchmarks for plan investments that reflect a mix of asset classes, rather than limiting plans to the use of a "broad-based securities market index" as the required benchmark.

Participant Understanding of Fees and Expenses. The SPARK Institute believes that the Department's existing fee disclosure rules thoroughly and accurately inform participants about the fees and expenses that are associated with their retirement plan accounts. Additionally, we believe that the existing comparison chart appropriately facilitates an "apples to apples" comparison that plan participants can use to help choose among investment options. The Department's participant fee disclosure rules have contributed to increased transparency and consistency.

The SPARK Institute does not believe that additional information or additional presentations should be added to the Department's existing participant fee disclosure rules. More information, more measurements, and more presentations would only serve to further overwhelm participants when attempting to choose among available options. This is concerning because participants who are overwhelmed by complex disclosures will be less likely to participate in a plan or otherwise engage in with the plan in ways that are beneficial to them.

Instead, what participants need is more education on the options that are available to them; and this education needs to occur in the appropriate context for which there is no "one size fits all" solution. Fees and expenses are important, but they should not be the exclusive focus of

[10] *See* Labor Reg. § 2550.404a-5(c)(1).

participant education. Other considerations, such as performance and the features that are available through certain products, should also be relevant to a participant's review and consideration of plan investment options. Unfortunately, even with additional education and improved resources, some participants will simply ignore or pay little attention to their retirement accounts – a fact that Department officials have previously acknowledged.[11]

In completing the report required by Section 340 of SECURE 2.0, the SPARK Institute urges the Department to fully consider how any potential addition of new information to the participant fee disclosures may itself increase plan fees for participants. For example, a potential recommendation for individualized fee reporting would require substantial system changes, the cost of which would ultimately be borne by plan participants through higher fees. These increased costs must be weighed against the marginal benefits that additional fee disclosures may create for participants.

To the extent that the Department recommends specific changes to the 404a-5 disclosures, the Department should only implement such changes following a notice and comment rulemaking. The participant fee disclosures involve practical and technical considerations for which any changes must account for public and industry input.

Blended Benchmarks. Question 9 of the RFI asks if there are additional factors 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.

We believe that the SECURE 2.0 provision provides the necessary guidance needed for those plans that wish to implement Section 318's optional performance benchmark. SECURE 2.0's relief for blended benchmarks is only available if: (1) the blend is reasonably representative of the asset class holdings of the designated investment alternative; (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), the blend is modified at least once per year if needed to reflect changes in the asset class holdings of the designated investment alternative; (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.

In Field Assistance Bulletin 2012-02R, Q&A-16, the Department addressed the possibility that a plan might wish to use a blended benchmark as an additional performance benchmark (because using it as the primary benchmark was not allowed by the 404a-5 regulations). The Department reiterated what it had said in the preamble to the regulation, that blended benchmarks were allowed if they are not inaccurate or misleading. The Department went on to state that "whether

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[11] *See* Letter from Acting Assistant Secretary Ali Khawar Responding to Government Accountability Office Fee Disclosure Recommendations (July 6, 2021) (explaining that "[a]dditional information, in and of itself, is not certain to make a measurable difference," while citing the "diverse population of plan participants – some of who read disclosures in detail, some who struggle to understand what they read, and some who ignore plan communications altogether.").

a target asset allocation is representative of the actual holdings of a designated investment alternative is dependent on the facts and circumstances; however, in the Department's view, target percentages ordinarily would be representative of an alternative's actual holdings if they are nearly equal to the daily average of the alternative's ratios of stocks and bonds (e.g., 50% stocks, 50% bonds) over a reasonable period of time. The Department anticipates there are other similarly acceptable methods of determining whether target percentages are representative of actual holdings."

Congress expressly rejected a requirement that the blended benchmark holdings "are nearly equal to the daily average" of the designated investment alternative. Instead, Congress required that "the blend is modified at least once per year if needed to reflect changes in the asset class holdings of the designated investment alternative."

E. Consolidation of Defined Contribution Plan Notices (341)

SECURE 2.0. By December 29, 2024, Section 341 of SECURE 2.0 directs the Department and the Treasury Department to issue regulations providing that a plan may consolidate two or more of the following notices for defined contribution plan participants into a single notice: (1) the qualified default investment alternative ("QDIA") notice; (2) the safe harbor notice; (3) the automatic enrollment safe harbor notice; and (4) the permissive withdrawal notice.

Confirmation of Existing Rules. Some of our members have expressed their surprise with the inclusion of this provision in SECURE 2.0 because existing sub-regulatory guidance has already endorsed the consolidation of the notices described in Section 341 of SECURE 2.0.[12] These members also believe, however, that it would be beneficial to confirm and incorporate this existing informal guidance regarding notice consolidation into formal regulatory guidance from the IRS and the Department.

F. 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 Code.

Form PR Update. Question 1 of the RFI asks what guidance, if any, is needed to implement these changes for purposes of reporting on Form PR. In response to this request, we are

[12] *See* Sample Automatic Enrollment and Default Investment Notice, available at: https://www.irs.gov/pub/irs-tege/sample_notice.pdf.

reiterating the relevant guidance request that the SPARK Institute sent to the Department earlier this year on April 25, 2023.

- 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 the Department 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.

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The SPARK Institute appreciates the opportunity to provide these comments to the Department. If you have any questions or would like more information regarding this letter, please contact the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com).

Sincerely,

Tim Rouse
Executive Director