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October 5, 2023

By *Electronic Submission* to www.regulations.gov

The Honorable Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

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

Dear Assistant Secretary Gomez:

On August 11, 2023, the U.S. Department of Labor (DOL) issued a Request for Information—SECURE 2.0 Reporting and Disclosure (the RFI¹).¹ The RFI includes several questions targeting the paper statement requirement enacted in section 338 of SECURE 2.0.² These RFI questions contemplate amendments to DOL regulations well beyond the provisions of section 338. Congress' directives to the Secretary of Labor in section 338 are clear, specific, and intentionally limited. This letter is intended to remind DOL of its obligation to comply with the statutory provisions of section 338, as limited by Congress.

Scope of Section 338 Enhanced Disclosure is Limited to Plans Taking Advantage of the Exceptions to the Paper Statement Requirement

Section 338(a)(2) provides a paper delivery requirement for only two statements ("Listed Statements"): (1) one pension benefit statement furnished for a calendar year with respect to an individual account plan under section 105(a)(1)(A) of the *Employee Retirement Income Security Act of 1974* (ERISA), and (2) one pension benefit statement furnished every three calendar years with respect to a defined benefit plan under ERISA section 105(a)(2)(B). Similarly, section 338's directions to the Secretary to provide enhanced electronic disclosure requirements are limited to

¹ Request for Information—SECURE 2.0 Reporting and Disclosure, 88 Fed. Reg. 54,511 (Aug. 11, 2023). SECURE 2.0 refers to Division T of the *Consolidated Appropriations Act, 2023*, Pub. L. No. 117-328 (2022).

² Request for Information—SECURE 2.0 Reporting and Disclosure, 88 Fed. Reg. at 54,514, 54,515.

plans that take advantage of the exceptions to paper delivery for Listed Statements.³ Thus, the statute does not direct the Secretary to apply such enhanced electronic disclosure requirements to other plans.

Exception to Paper Requirement for Listed Statements Provided Electronically under the 2002 Safe Harbor

Section 338(a) authorizes electronic delivery for Listed Statements by use of the 2002 Safe Harbor electronic delivery method.⁴ Section 338(b)(1) directs the Secretary to update the 2002 Safe Harbor regulation to provide one limited condition to using the 2002 Safe Harbor for relief from section 338 paper statement requirement. The one limited condition is that a plan must provide an initial paper notice to participants who first become eligible to participate and beneficiaries who are first eligible for benefits after December 31, 2025. Section 338 contemplates no other expansion of the 2002 Safe Harbor as it existed on the date of SECURE 2.0's enactment.

Exception to Paper Requirement for Listed Statements Provided Electronically Upon Request

Section 338(a) specifically authorizes the use of electronic delivery if a plan permits a participant or beneficiary to request electronic delivery of the Listed Statements and the statements are so delivered.⁵ Section 338(b) also directs the Secretary to update “applicable guidance governing electronic disclosure” other than the 2002 Safe Harbor⁶ for five items specifically listed in section 338.⁷ This directive applies only to plans that provide for electronic delivery of the Listed Statements upon request and does not apply to other plans.

Abusive Regulatory Expansion and Gross Overreach Foreshadowed by RFI

In contrast to the limited and express provisions of section 338, RFI Question 21 contemplates additional, and very significant, regulatory requirements not authorized by Congress. Question

³ Section 338(b)(1) directs the Secretary to require an initial paper notice as a condition to the exception provided in 29 U.S.C. § 1025(a)(2)(E)(i), ERISA § 105(a)(2)(E)(i), as amended by section 338. Section 338(b)(2) directs the Secretary to amend other electronic delivery requirements as a condition to the exception provided in 29 U.S.C. § 1025(a)(2)(E)(ii), ERISA § 105(a)(2)(E)(ii), as amended by section 338.

⁴ 29 U.S.C. § 1025(a)(2)(E)(i), ERISA § 105(a)(2)(E)(i) (as amended by SECURE 2.0, effective for plan years beginning after December 31, 2025, referring to 29 C.F.R. § 2520.104b-1(c), a safe harbor added to the regulations in April 2002 and widely referred to as the “2002 Safe Harbor”).

⁵ 29 U.S.C. § 1025(a)(2)(E)(ii), ERISA § 105(a)(2)(E)(ii) (as amended by SECURE 2.0, effective for plan years beginning after December 31, 2025, generally providing for electronic delivery in lieu of paper upon request).

⁶ Section 338(b)(2) directs the Secretary to update electronic delivery guidance other than the 2002 Safe Harbor for five listed items.

⁷ Section 338(b)(2) lists five specific items providing (A) the opportunity to request electronic delivery, (B) an explanation, on each paper statement, of how to request electronic delivery and contact information for the plan sponsor, including a phone number, (C) a prohibition on charges for paper statement delivery, (D) an explanation, on each e-delivery document, of how to request paper delivery, and (E) the ability to furnish duplicates of paper statements in e-delivery documents. Again, section 338(b)'s directed changes are limited to plans that are taking advantage of the relief from the requirement to supply the paper statements listed in section 338(a).

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21 asks, “should [DOL’s electronic delivery guidance] be modified such that their continued use by plans is conditioned on access in fact?” The RFI further asks:

Can plan administrators (through their electronic delivery systems) reliably and accurately ascertain whether an individual actually accessed or downloaded an electronically furnished disclosure, or determine the length of time the individual accessed the document? If so, should the safe harbors contain a condition that plan administrators monitor whether individuals actually visited the specified website or logged on to the website as a condition of treating website access as effective disclosure?... [S]hould the safe harbors require that plan administrators revert to paper disclosures or take some other action in the case of individuals whom plan administrators know forsake such access?

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.

Request and Direction to Limit Regulatory Expansion

Congress’ directions to the Secretary in section 338 are both specific and limited. Section 338 does not authorize or contemplate the ill-conceived regulatory overreach foreshadowed in the RFI. DOL must limit its regulatory amendments to those Congress specified in section 338.

Sincerely,



Virginia Foxx
Chairwoman