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SUBMITTED ELECTRONICALLY

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

Attention: Request for Information – SECURE 2.0 Reporting and Disclosure.

Dear Sir or Madam:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to respond to the Request for Information ("RFI") focusing on certain sections of the SECURE 2.0 Act of 2022 ("SECURE 2.0") that principally impact, directly or indirectly, reporting and disclosure requirements of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). As one of the nation's leading retirement services providers, we have a deep and long-standing commitment to working with the Department on its rulemakings in the area of reporting and disclosure. We appreciate the opportunity to respond to a number of the questions the Department has raised in the RFI.

Requirement to Provide Paper Statements in Certain Cases

SECURE 2.0 Section 338 adds 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 the Department's existing e-delivery rules: (1) a new one-time initial paper notice for participants who first become eligible to participate after December 31, 2025 and receive benefit statements in accordance with the Department's 2002 safe harbors; and (2) 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 the bill.

The 2002 safe harbor has worked well for more than twenty years, and we are not aware of any

[1] Fidelity was founded in 1946 and is one of the world's largest providers of financial services. Fidelity provides recordkeeping, investment management, brokerage and custodial/trustee services to thousands of Code section 401(k), 403(b) and other retirement plans covering approximately 25 million participants and beneficiaries. Fidelity is the nation's largest provider of services to individual retirement accounts ("IRA") with more than 7 million accounts under administration. Fidelity also provides brokerage, operational and administrative support, and investment products and services to thousands of third-party, unaffiliated financial services firms (including investment advisors, broker-dealers, banks, insurance companies and third-party administrators).

widespread misuse or inadequacy of the safe harbor that would warrant change. To the contrary, our employer clients and their participants routinely and appropriately use the safe harbor for a wide variety of communications today. Indeed, participants' preference for receiving communications using these safe harbors is evidenced by the fact that they often express annoyance and dissatisfaction in the event we communicate with them by paper after they have elected electronic delivery.

Accordingly, it is unnecessary to modify the safe harbors other than to the extent explicitly required by Section 338 of SECURE 2.0. In particular, it is unnecessary to include updates to the 2002 safe harbor that would require an initial paper notice with a level of detail similar to that required by paragraph (g) of the 2020 safe harbor. The population of participants eligible for the 2002 safe harbor are essentially those participants that have "opted-in" to electronic delivery, either through an affirmative election or by virtue of taking a job through which they are expected to receive important information through an employer-provided email address (i.e., wired-at-work). These participants are dissimilar from participants who are receiving electronic communications by default under the 2020 safe harbor and thus may benefit from a more detailed initial notice in advance of electronic communication. Moreover, no other changes are needed to ensure that the safe harbors satisfy the standards specified in SECURE 2.0.

We further strongly urge the Department not to modify any electronic delivery safe harbors to condition their use on the "access in fact" concept discussed in the RFI. This change would apparently require plan administrators to track whether individual participants accessed or downloaded an electronically furnished disclosure, whether individual participants actually visited a website on which a disclosure is posted, and how long such access or visit occurred. In the absence of evidence of access, the participant would be reverted to paper delivery.

Such a change would increase the burdens of delivering required disclosures and runs counter to congressional intent reflected in SECURE 2.0 and the practical reality of current levels of plan participant access to mobile phones and the internet.[2] Indeed, the Department received comments related to this concept in connection with the 2020 safe harbor and declined to include a monitoring requirement.[3] The safeguards incorporated into the 2002 and 2020 safe harbor

[2] Congress' intent to support electronic disclosure is evident in other areas, as well. For example, the Improving Disclosure for Investors Act of 2023 was introduced on a bipartisan basis last Congress, reintroduced again with bipartisan support this Congress, and passed out of the House Financial Services Committee on April 26, 2023, with bipartisan support. See https://www.congress.gov/118/bills/hr1807/BILLS-118hr1807ih.pdf.

[3] 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 ("The Department disagrees that compliance with this final rule, which includes a variety of protections and safeguards for covered individuals, in addition to this paragraph (f)(4), fails to satisfy ERISA's standard for delivery. 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. 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. It is unlikely in all cases that the capabilities or functioning of existing monitoring systems would align precisely with a new regulatory requirement. Further, the Department believes that the rule's protections for covered

guidance are more than reasonably calculated to ensure that disclosures are received by their intended recipients.

In addition, there are many reasons why a participant may or may not choose to access a particular disclosure or communication that would have no bearing on whether the participant received the disclosure or communication. For example, some participants regularly check their plan account balances online. They may have no need to click a link to their account statement received in an electronic communication if they have just checked their plan account balances online on their own. Likewise, some participants choose to invest their accounts in a managed account option made available in a plan. Such participants may have no inclination to click a link to information regarding a change to the funds in a fund lineup. Yet that does not mean that the participant did not receive the fund change disclosure or that sending all future disclosures in paper format is warranted.

Finally, continually adding or removing participants from "eligible for electronic delivery" lists based on their actual access of a particular electronic notice would likely confuse and annoy participants who would alternately receive paper or electronic delivery based on whether they accessed the latest electronic disclosure or not. And it is worth noting that plan administrators are not required under ERISA, regulation or other guidance to somehow discern whether a participant has opened his or her paper mail to look at a disclosure contained in the envelope. Such a requirement would clearly not be appropriate. The same holds true with respect to disclosures delivered electronically under the safe harbors.

Performance Benchmarks for Asset Allocation Funds

The Department asks whether there are additional factors beyond the criteria in section 318 of SECURE 2.0 that plan investment fiduciaries 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. If so, the Department asks what those factors are and why should the Department consider them when developing regulations.

In our view, it is difficult to define a single benchmark or measure that enables a fulsome evaluation of the various dimensions of TDFs. When designing target date fund ("TDF") portfolios, asset managers consider a variety of factors and make their decisions based on insights about the capital markets (e.g., return, risk, diversification, active management), participant needs, plan sponsor needs, and other considerations (e.g., regulatory requirements and fees). Because each TDF manager has distinct philosophies and views about each of these factors and how to prioritize them, this results in differences in investment strategies among TDF managers. As a result, while TDFs are designed to be retirement solutions, TDF managers are striving to achieve distinct goals based on their investment strategies that are neither common

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individuals, not only paragraph (f)(4) but, for example, the clear and timely communication of website activity and paper and opt-out rights to preserve individuals' delivery preferences, taken together, provide a method of furnishing documents that is more than reasonably calculated to ensure actual receipt of covered documents. Thus, the Department does not see a compelling reason to establish a stricter standard for monitoring covered individuals' use of disclosures furnished electronically than for paper deliveries.").

nor standardized.

Section 318 of SECURE 2.0 includes criteria for plan investment fiduciaries to apply when selecting and monitoring blended performance benchmarks for TDFs. This section indicates that multi-asset strategies and performance can be benchmarked against a blend of broad-based securities market indices, provided (a) the index blend reasonably matches the fund's asset allocation over time, (b) the index blend is reset at least once a year, and (c) the underlying indices are appropriate for the investment's component asset classes and otherwise meet the rule's conditions for index benchmarks.

In addition to the provisions outlined in Section 318, we believe that the process for benchmarking TDFs should follow the general principles that are identified by the CFA Institute for selecting an appropriate benchmark.[4] Specifically, as the CFA Institute notes on page 3 of its Guidance Statement, a TDF benchmark should be specified in advance, and should also be relevant, measurable, unambiguous, representative of the current investment options, accountable, investable, and complete.

In our view, it is difficult to define a single benchmark that provides a fulsome evaluation of the various dimensions of a TDF. For that reason, we believe both custom-designed composite indices and peer group-based market indices can serve distinct, yet complementary roles in evaluating TDFs. We also believe plan investment fiduciaries can evaluate TDFs most effectively if they consider other performance measures relative to these benchmarks, as doing so will allow them to assess the trade-offs that TDF managers make when designing and managing their TDF portfolios.

With respect to TDF benchmarks, custom-designed composite benchmark indices are most useful for evaluating a TDF's performance because they are representative of the TDF strategy's asset allocation. Consistent with Section 318 and the CFA Institute standards, most TDF managers have developed composite benchmarks that include multiple public indices and weights that are representative of the strategic asset allocation for their TDF strategies. The composite benchmark is therefore a reference point for relative performance measurement, against which the impact of portfolio management decisions can be evaluated. For example, a TDF with active portfolio management may be expected to outperform its composite benchmark over long-term periods, whereas an index TDF may be expected to closely track the performance of its composite benchmark.[5]

As a complement to the custom-designed composite benchmark indices, peer-based market benchmark indices, including the Morningstar target date fund categories and S&P Target Date Indices, are useful for comparing a TDF manager's investment strategies, diversification, and

[4] *See* CFA Institute, *Guidance Statement on Benchmarks for Firms* (Apr. 2021), https://www.cfainstitute.org/-/media/documents/code/gips/guidance-statement-benchmarks-firms.ashx.
[5] For more information regarding the construction of custom-designed composite indices, *see* Fidelity Research, *Is Your "Index" Target Date Fund Performing Like Its Index?* (2022), https://clearingcustody.fidelity.com/app/literature/white-paper/9899605/is-your-index-target-date-fund-performing-like-its-index.html.

level of risk-taking to industry averages. Because peer-based indices reflect average asset allocations across a group of TDFs, they are not designed to be representative of the asset allocations of any particular TDF. Nonetheless, plan investment fiduciaries may find peer-based indices useful for comparing the performance of TDFs in distinct market environments and to assess the trade-offs that each TDF manager makes relative to the average of all strategies in the industry.

We also note that many plan investment fiduciaries focus primarily on the total returns of TDFs, particularly in comparison to peer-group benchmarks. This focus incentivizes TDF managers to seek the highest total return as the primary goal for all of their TDF portfolios. In our view, an undue emphasis on total returns may lead TDF managers to increase their strategic allocations to assets with higher expected returns (e.g., equities and credit-oriented bonds). Such increases typically reduce diversification while increasing volatility and risk, including the potential for and size of drawdowns in the TDFs. We do not believe this is desirable outcome for, or in the best interests of, plan participants or beneficiaries.

The emphasis on total returns of TDFs has contributed to an increase in lawsuits directed at plan investment fiduciaries and their processes for selecting and evaluating TDFs. These lawsuits, which we view as meritless and an unnecessary burden for plan investment fiduciaries, have focused primarily on TDF performance over shorter-term time periods and total returns relative to peer-based indices. The current regulatory framework can be improved by encouraging plan investment fiduciaries to evaluate and compare TDF managers and their strategies based on measures in addition to total returns. Because TDFs are diversified portfolios that evolve through an investor's lifecycle, TDF managers make decisions that require trade-offs between return and risk when determining allocations. Measures such as risk-adjusted returns (Sharpe ratios) and performance during market drawdowns serve as complements to total returns and bring balanced perspectives to the evaluation process that reinforce the importance of diversification as a foundation for TDFs.

Finally, we believe plan investment fiduciaries would be better served by increased transparency with respect to TDF manager accountability and incentives. Answers to the following questions, among others, would provide meaningful insights that would enable them to better evaluate TDF managers: "Who is responsible for the strategic allocation decisions within the TDF that result in the target date fund's performance?" "How does the TDF manager define "success"? The responses to these types of questions can provide valuable insights into the structure, design, and performance expectations for a target date fund.

In sum, custom-designed composite benchmark indices play an important role in helping plan investment fiduciaries evaluate TDFs because they provide a reference point for relative TDF performance, against which the effect of portfolio management can be evaluated. Peer group-based market benchmark indices are a useful complement for comparing a TDF manager's investment strategies, diversification, and level of risk taking relative to industry averages. Plan investment fiduciaries are best served if they also consider other performance measures such as risk-adjusted returns (Sharpe ratios) and performance during market drawdowns in addition to total returns during their TDF evaluation process. Finally, increased transparency regarding TDF

manager accountability and incentives would assist plan investment fiduciaries by providing valuable insights into a TDF's structure, design, and performance expectations.

Eliminating Unnecessary Plan Requirements Related to Unenrolled Participants

Section 320 of SECURE 2.0 amends ERISA by inserting a new Section 111 that eliminates the requirement to provide certain disclosures to "unenrolled participants" if certain initial disclosure and "annual reminder notice" requirements are met. We believe this provision will be helpful to both plan sponsors and unenrolled participants and that no further guidance, criteria or a model notice are necessary to implement Section 111.

We support providing participants with continuous online access to detailed plan information as well as the ability to request paper versions of materials. Notices regarding the availability of plan information should flow at the time most relevant to individual investment decision-making process with content tailored to the circumstances. With respect to all participants, and particularly those who are unenrolled, clarity and brevity in communication is preferred to avoid information overload that leads to continued participant inertia. This is especially relevant when considering the content of an "annual reminder notice". The "annual reminder notice" should prompt interest and engagement of the unenrolled participant. An overly detailed notice may have the undesired effect of continued participant inaction, where participants remain unenrolled in the plan. Moreover, we do not believe it is necessary for the Department to create model language, and it is likely not feasible to create such language given the diversity of plan structures.

Defined Contribution Plan Fee Disclosure Improvements

SECURE Act 2.0 Section 340 directs the Department to review fee disclosure regulations related to participant-directed individual account plans under 29 CFR 2550.404a-5. This review is intended to assess how the regulation could be improved to enhance participants' understanding of plan fees and expenses. We do not believe that a thorough assessment of the effectiveness of the participant fee disclosure regulation and how it may be improved is possible within the 60-day comment period provided for this RFI. A more thorough study should be undertaken to evaluate the effectiveness of the current disclosures, and any proposed changes should be subject to notice and public comment.

That said, we have produced and delivered millions of notices since the fee disclosure regulation went into effect in 2011 to assist our plan sponsor clients in meeting their disclosure responsibilities and would make the following general observations. The fee disclosure regulations were intended to create a disclosure regime that allows participants to compare investment options on a reasonably consistent and uniform basis. We believe that current fee disclosure content requirements, including the Departments' model comparative chart, generally meet this goal. At the same time, we do not receive a significant number of inquiries from plan participants related to the fee disclosure notice. We believe this may be because participants primarily utilize other materials provided in connection with the on-line enrollment process that contain similar investment content, and that the interactive presentation of this content is easier

to use than the fee disclosure and chart. Therefore, while the content required by the current fee disclosure regulations may be sufficient, the form and manner in which the content is provided may not be resulting in high usage by participants.

Consolidation of Defined Contribution Plan Notices

Section 341 of SECURE 2.0 directs the Department to issue regulations providing that certain notices to plan participants can be consolidated into a single notice. We support efforts to reduce the number of required notices furnished to participants, particularly those containing similar information. Section 341 also states that plan fiduciaries must satisfy the timing requirements of each notice that is consolidated. We encourage the Department to implement regulations that would harmonize the timing of required notices in order to permit plan sponsors to gain further efficiencies by sending related plan notices at the same time.

However, the notices identified by Section 341 may already be delivered in a single envelope, if not further consolidated, under current guidance so long as applicable timing requirements are met. So while guidance focused on these specific disclosures would be welcome, we believe much more could be done to consolidate, simplify and increase the usability of current required disclosures more generally. We encourage the Department to undertake a broader study of how this could be done and would welcome the opportunity to provide further comment at the Department's convenience.

Pooled Employer Plans ("PEPs")

The Department has asked a number of questions regarding the study it is directed to perform and report on about the PEP industry and recommendations regarding how to serve and protect retirement plan participants. In particular, the Department has asked how it could gather certain information for purposes of a study, including how it could identify the "range of investment options provided in such plans," as well as what sources of information could be used to collect data on the topics enumerated in Section 344(1) of SECURE 2.0. We believe that information on fees, participating employers, service providers and other PEP-related data should already be captured and disclosed on Form PR and Form 5500. Section 103(g) of ERISA, as amended by the SECURE Act of 2019, requires the annual report for a PEP to include a list of participating employers in the plan, a good faith estimate of the percentage of total contributions made by each participating employer during the plan year, and the aggregate account balances attributable to each employer in the plan.[6] We believe that this information, along with other information on Form 5500 and Form PR, should provide much of the data that the Department needs for the study.

We also believe that information on the range of investment options provided in such plans can be determined through the information provided on Form 5500, including Schedule H. We agree with the Department, moreover, that Section 344(1)(C) of SECURE 2.0 does not require examination of investments available through any brokerage windows that may be made

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[6] In September 2021, the Department also proposed changes to Form 5500 which included the requirement for a new Schedule MEP that would identify similar information with respect to participating employers in a PEP.

available in PEPs.[7] Such investments are not currently required to be detailed on Form 5500 generally, and we do not believe there would be a benefit in detailing them with respect to PEPs specifically.

The Department notes that the study is also required to focus on the "manner in which employers select and monitor such plans," and asks how and by whom are PEPs most commonly marketed to employers; whether marketing techniques differ based on the size of employers; how often employers rely on the advice of others when selecting and monitoring a PEP; and who gives this advice to employers.

As PEPs are still a nascent plan type, the strategies and techniques employed to market PEPs to small employers are still developing. We continue to market our PEP offering exclusively to small employers that do not currently offer a retirement plan, and thus have employed different strategies to reach that target audience, including using direct marketing via paid media and partnerships, as well as leveraging relationships with consultants, financial advisors, brokers and other third parties such as payroll providers.

With respect to how employers select and monitor PEPs, pooled plan providers and other PEP service providers, how they decide to adopt and maintain their participation in PEPs, and who advises them, the Department should solicit participating employers directly. To the extent the Department does not receive sufficient feedback in response to this RFI, this information could be obtained through focus groups, online polling and other similar information gathering techniques.

In addition, the Department notes that section 344(1)(F) of SECURE 2.0 requires the study to focus on the "disclosures provided to participants in such plans." We interpret this to refer to disclosures required by ERISA or regulations thereunder, as opposed to communications or other disclosures that may be provided to PEP participants voluntarily. Accordingly, we do not see a need for the Department to collect examples of such disclosures or otherwise solicit information from employers, PEPs, plan administrators, or other parties on the disclosures provided to plan participants. Rather, the Department should assume that such disclosures are being provided as required.

Finally, it is not necessary to require additional or different information to be disclosed to participants in the context of PEPs, versus what ERISA requires to be disclosed under ERISA to participants in other employer plans. We believe PEP participants are similarly situated to participants in any other ERISA plan. PEPs maintain the same plan designs and generally offer the same investment types as other non-PEP plans, and PEPs are overseen by fiduciaries just as with other non-PEP plans. Depending on the plan design of a PEP, specific disclosures are already required to be provided to plan participants, including disclosures under Section 404(a)(5) of ERISA, safe harbor notices under Treasury Regulation §1.401(k)-3 and qualified

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[7] The Department also asks what guidance, if any, is needed to implement the revised definition in ERISA section 3(43)(B)(ii). We do not believe that significant guidance is needed in this regard.

default investment alternative ("QDIA") notices under section 404(c)(5) of ERISA, among others as applicable. There is no additional information uniquely needed by a PEP plan participant that is not already adequately addressed through these required disclosures.[8]

Emergency Savings Accounts Linked to Individual Account Plans

Emergency savings accounts are a necessary component of financial wellness, and we strongly support these types of accounts. While the passage of the SECURE 2.0 provision for emergency savings is a positive step forward, it also introduces the potential for high administrative burdens and costs that may deter employers from moving forward with pension-linked emergency savings accounts ("PLESAs"). Prior to the establishment of PLESAs, we began offering an out-of-plan emergency savings option that many employers have adopted to help their employees save for emergencies. Due to the complexity of PLESAs and the success of our out-of-plan emergency savings accounts, we do not plan to prioritize PLESAs in the near future. While guidance and a model notice around PLESAs may be helpful in the future, we do not believe that the Department should prioritize such guidance over the other guidance addressed in the RFI.

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We are available to discuss any questions you may have with respect to this response to the RFI.

Sincerely,

James Barr Haines
SVP & Deputy General Counsel

[8] The Department has also asked how to demonstrate whether PEPs have resulted in increased retirement saving coverage, noting that if the participating employers previously maintained a retirement plan, that could indicate a transfer of coverage types, rather than an increase in coverage. As noted above, the Fidelity PEP is only offered to small employers who previously did not maintain a retirement plan. So, the ongoing adoption of the Fidelity PEP by participating employers should result in an increase in retirement coverage in the small employer demographic. The Department could attempt to ascertain whether participating employers previously maintained an employer plan prior to adopting a PEP by adding a request for such information to Schedule MEP of the Form 5500.