October 10, 2023

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

To Whom It May Concern,

The Pension Committee ("the Committee") of the American Academy of Actuaries[1] is pleased to offer the following comments in response to the Department of Labor (DOL) Employee Benefits Security Administration's (EBSA) Request for Information on a number of provisions of Division T of the Consolidated Appropriations Act, 2023, (Dec. 29, 2022) (referred to as the SECURE 2.0 Act of 2022 or SECURE 2.0) that impact the reporting and disclosure framework of the Employee Retirement Income Security Act of 1974 (ERISA). The Committee appreciates this opportunity to provide feedback.

Section 342. Information Needed for Financial Options Risk Mitigation.

Question 23: Is there a need for guidance with respect to any of the specific content requirements in ERISA section 113(b)(1)(A) through (H)? If so, please specify the particular content requirement and explain the need for guidance.

Response:
Section 113(b)(1)(A) requires the notice to include a statement as to whether there is an available "…subsidized early retirement option…" Additionally, Section 113(b)(1)(B) requires the notice to state whether any "early retirement subsidies" are included in the calculation of the lump sum. The same phrase also appears in section 113(c)(3). Guidance is needed to define what "subsidies" are for the purpose of this notice. For example, should the comparison to determine whether an option or factor is subsidized be done using the principles employed for the relative value notice? It may be confusing to participants if the comparison is determined differently from the information shown on the relative value notice.

[1] The American Academy of Actuaries is a 19,500-member professional association whose mission is to serve the public and the U.S. actuarial profession. For more than 50 years, the Academy has assisted public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

How should plan sponsors comply with this requirement if the comparison basis changes, potentially as frequently as monthly? For example, a plan may not have subsidized early retirement factors in comparison to one set of assumptions but may under a different set of assumptions. This may occur even in cases where the early retirement factor is determined based on the definition of actuarial equivalence in the plan, depending on the comparison basis. Is the determination as to whether an early retirement option or an early retirement factor used in the calculation of a lump sum is subsidized done on a general basis or on an individual basis?

In the case of most cash balance plans, there is no explicit early retirement factor. However, depending upon how subsidy is defined for this purpose, a cash balance plan could appear to have a subsidy. The assumptions used would determine what defines a subsidy in this case.

Subsidies may arise from either subsidized early retirement factors or subsidized lump sum conversion factors. For example, some plans may pay lump sums in excess of those calculated using 417(e) assumptions. The coordination of subsidies may be important for the participant to understand.

Question 24: ERISA section 113(b)(1)(E) requires the notice to specify, in a manner calculated to be understood by the average plan participant, the "potential ramifications of accepting the lump sum." Beyond the specific items set forth in ERISA section 113(b)(1)(E), what other potential ramifications should the Department consider incorporating into regulations under ERISA section 113, and why?

Response:
A previous statement of the Pension Committee of the American Academy of Actuaries, presented to the ERISA Advisory Council on May 28, 2015, provided detailed recommendations surrounding risk transfers activity involving lump sum distributions and offers commentary on a 2015 GAO report on the topic. The statement includes the potential impact of inflation, investment risk, longevity risk, and the risk arising from changes in interest rates over time. The statement also provides considerations regarding the disclosure of PBGC protections.

A copy of the statement may be found here.

Question 25: Are transactional complexity, aging and cognitive decline, and financial literacy relevant factors the Department should consider when deciding to add to the list of potential ramifications in making regulations under section 113 of ERISA? Risk transfer transactions are by nature inherently complex involving uncertainty. Some behavioral finance professionals suggest that more and better information by itself is unlikely to ensure that people, even with average financial literacy, make good choices in the cognitively challenging task of choosing between an annuity and a lump-sum payout. Despite such challenges, are there ways to structure and present the notice that would increase the likelihood of better decisions and retirement outcomes?

Response:

A previous statement of the Pension Committee of the American Academy of Actuaries, presented to the ERISA Advisory Council on May 28, 2015, provided detailed recommendations surrounding risk transfers activity involving lump sum distributions and offers commentary on a 2015 GAO report on the topic. Retiree lump sum offers, in comparison to general lump sum offers, may require additional care to ensure the annuitant understands the offer and is capable of making a decision. Retiree lump sum offers are rare, given the competitive environment for annuities. A copy of the statement may be found here.

Question 26: Are there mandatory notices or disclosures under the Code that the Department should factor into the development of regulations under section 113 of ERISA? If so, which notices and disclosures, and how should they be factored into regulations under section 113 of ERISA?

Response:
Any existing mandatory notices or disclosures should be considered to avoid requiring the provision of duplicative, or seemingly contradictory, information. For example, the relative value notice will already provide information about the value of the lump sum in comparison to other annuity options available to the participant. A statement of the consequences of a failure to defer is also already required.

Question 27: The Department must issue a model notice for plan administrators to use in discharging their new statutory disclosure obligations under section 113 of ERISA. Commenters are encouraged to submit for the Department's consideration exemplary samples of notices that plan administrators have used in prior lump sum offers that comprehensively explain the consequences of electing a lump sum in lieu of annuity payments for life. Commenters should include a concise explanation of why the commenter believes that the sample was effective in conveying meaningful information to participants and beneficiaries. The Department, in turn, offers for consideration by commenters a model notice developed in 2015 by the ERISA Advisory Council.9 The Council's model is the product of careful deliberation following the receipt of extensive public input from a broad array of stakeholders.10 The model is attached as Appendix B to this RFI.11 Should the Department consider using this model as the starting point for the model required under section 113 of ERISA, and if not, why? If so, to what extent could and should this model be improved, for example, to conform to specific requirements under section 113 that were not considered by the ERISA Advisory Council?

Response:
Finding ways to communicate the information in a clear, concise, and efficient manner to suit participants needs will be critically important to ensuring that the information can remain useful and facilitate the goal of improving participant understanding in their decision-making regarding lump sum or annuity income. Certainly, some information provided within the participant election package should be detailed and personalized to the participant and plan. However, other information could appropriately be covered in less detail and in broader terms. One approach would be to provide high-level information within the direct participant communication, supported by easy-to-access, detailed supplemental information that participants can refer to as needed to support their individual decision making.

A previous statement of the Pension Committee of the American Academy of Actuaries presented to the ERISA Advisory Council on May 28, 2015, pages 8 and 9, provided detailed recommendations surrounding educational materials that would be useful for participants.

A copy of the statement may be found here.

Question 28: ERISA section 113 contains a pre- and post-election window reporting framework under which plans must report information relating to the lump sum offerings and elections to the Department and the PBGC. In addition to the number of participants and beneficiaries who accepted the lump sum offer, the Department has authority to require plans to furnish "such other information as the Department may require" in the post-election report. Separately, the Department itself must report information about offerings and elections to Congress on a biennial basis. The Department also must post on its website for public consumption the information it receives under this reporting framework. The Department is considering what information should be reported to the Department to ensure that the Department can effectively discharge its monitoring, enforcement, public disclosure, and biennial reporting obligations under ERISA. To these ends, what data or information other than the number of participants and beneficiaries who were eligible for and accepted lump sum offers should be reported to the Department, and why? For instance, should the Department collect demographic information on those individuals who elected lump sum offers and, if so, what information? This information could, for instance, enable the Department to provide Congress with more detailed information on the cohorts of participants and beneficiaries who accept lump sum offers as compared to those who do not.

Response:
Since some plans have permanent lump sum options available, it is difficult to draw any broad conclusions from the number of people making an election to take a lump sum when restricting the sample to only lump sum windows. However, it would be useful to understand the average demographics, including sex/gender, and size of benefits of participants offered and accepting lump sums as well as how many participants elected an unsubsidized lump sum in lieu of a subsidized early retirement annuity. This information could be reported in an aggregated format. This information may provide information about how material the lump sum may be for the individuals taking the lump sums or insights into what additional education may be helpful.

***Defined Benefit Annual Funding Notices*.** Section 343

Question 29: Is there a need for guidance with respect to any of the amended content requirements in section 101(f)(2)(B) of ERISA? If so, please specify the provision and explain the need for such guidance.

Response:
Section 101(f)(2)(B)(ii) now reads "a statement of the number of participants for the plan year to which the notice relates as of the last day of such plan year and the preceding 2 plan years…." Plan sponsors may not have received census data as of the last day of the plan year to which the notice relates in time for such counts to be noted in this notice. The census data review process can be a significant effort and may not be complete until much later in the year. Counts as of the valuation date are sufficient for this purpose when updated census is not available, however if it is required that end-of-year counts are provided, guidance might be provided to allow for a projection of the number of participants from the beginning of the year to the end of the plan year, similar to how liabilities are projected from the beginning of the plan year to the end of the plan year.

The required disclosures under 101(f)(2)(B)(ii)(I) and 101(f)(2)(B)(ix) appear to be the same liabilities, assets and funded status. Please clarify if this disclosure may still only be shown once, and whether that depends on whether the funded percentages are all below 100% (i.e., is it necessary to both show a funded percentage of over 100% and also state that the funded percentage is above 100%).

101(f)(2)(B)(ii)(I)(cc) only appears to apply if the information in (aa) and (bb) is shown in a tabular format. Please clarify if this information is also needed if the information is shown in a format other than tabular.

The liabilities as of the end of the year as defined in 101(f)(2)(B)(ii)(I))(aa) define only the interest rate that should be used to calculate the liability. Guidance regarding the method or assumptions that should be utilized for the liability calculation may need to be updated for the changes in this section.

101(f)(2)(B)(iv) requires disclosure of the average return on assets for the plan year. If a specific method is required, such as the method used for the asset return shown on Schedule SB, guidance should be provided.

101(f)(2)(B)(vii) requires disclosure of material events. Previously, a Rule by the Employee Benefits Security Administration on 02/02/2015 refers to the liabilities in the prior section 101(f)(2)(B)(i) to determine if a material event has occurred using. With this section now struck, what would be a "reasonable" basis for determining whether a material event has occurred?

Question 30: Is there a need for guidance on the interrelationship of the new definition of "percentage of plan liabilities funded" in section 101(f)(2)(B) and the segment rate stabilization disclosure provisions in section 101(f)(2)(D)? When applicable, the segment rate stabilization disclosure provisions continue to use the funding target attainment percentage. In responding to

this question, commenters are encouraged to address the extent to which participants and beneficiaries would find value in, or alternatively be confused by, two different funding percentages for the same plan.

Response:
We believe that most participants and beneficiaries would be confused by two different funding percentages for the same plan. Given the change in the liabilities, assets, and funding status in section 101(f)(2)(B), the additional disclosures in section 101(f)(2)(D) are now out of context. Additional commentary to describe the information disclosed in 101(f)(2)(D) would be helpful to provide information regarding the differences between the percentages. Because of the requirement in Section 40211(b)(2)(B) of MAP-21 to provide this disclosure prominently, this information is often presented on the first page of the notice, which may no longer be appropriate.

Question 31: Existing regulations under section 101(f) of ERISA contain a model notice for single-employer defined benefit plans.12 The Department is interested in suggestions and comments on how to modify the model to reflect the amendments to section 101(f) of ERISA by SECURE 2.0, and for improvements more generally. For ease of reference, the model is attached to this RFI as Appendix C.

Response:
The amendments to section 101(f) made by SECURE 2.0 allow for simplification of the model notice for single-employer plans. The changes make it possible to eliminate the following sections without any loss of information:

- Plan Assets and Credit Balances. Because the credit balances are no longer disclosed, there should be no need to include any description of those balances.
- Year-End Assets and Liabilities. The disclosure of the market assets and market-consistent liabilities should make this section redundant with the “How Well Funded Is Your Plan” section and, therefore, can be eliminated.

Beyond the various wording changes necessary to describe the new disclosure items, any additional simplification would improve the model notice. The At-Risk Liabilities section is one that could be simplified for at-risk plans. For example, we think the disclosure of at-risk liabilities may no longer add value given the expanded disclosure of the year-end market-based liabilities and assets. A more simplified statement that the plan being at risk means the minimum required contributions are higher could replace current language in this section.

We appreciate your consideration of these comments. Please contact Philip Maguire, the Academy’s pension policy analyst (maguire@actuary.org; 202-223-7868), if you have any questions or would like to arrange a convenient time to discuss this matter further.

Respectfully submitted,

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American Academy of Actuaries