AMERICAN BENEFITS COUNCIL

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Delivered via email

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Re: Immediate Guidance Needs Under SECURE 2.0

Dear Carol and Rachel:

The enactment of the SECURE 2.0 Act of 2022 ("SECURE 2.0") on December 29, 2022, was a significant achievement for retirement security and all who worked tirelessly to see that the bill's 92 provisions to improve our retirement system became law. As employers, plan and IRA providers, workers, and retirees now turn to implementing and utilizing the changes made by the new law, guidance will be needed very quickly from the Treasury Department and the Internal Revenue Service (collectively referred to as "Treasury") and the Department of Labor (DOL) with respect to many of SECURE 2.0's provisions.

The American Benefits Council (the "Council") is writing to identify what we believe are ***the most important, time-sensitive issues with respect to which Treasury guidance is needed as soon as possible***. Each provision discussed below has a 2023 or earlier effective date, or otherwise has immediate implications for which guidance is needed. We hope this letter is helpful as Treasury identifies and prioritizes its SECURE 2.0 guidance projects. The Council will follow up with a separate letter identifying additional SECURE 2.0 items for which guidance will be needed but where such need is not immediate (i.e., generally those provisions that are effective in 2024 or later).

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INCREASE IN RMD AGE (SECTION 107)

Summary of relevant change: Prior to SECURE 2.0, employees and IRA owners were generally required to begin taking required minimum distributions (RMDs) from their plan or IRA by April 1st of the calendar year following the calendar year in which the individual reached age 72. SECURE 2.0 increased the age triggering this "required beginning date" from 72 to 73 for individuals who attain age 72 after 2022. Thus, under SECURE 2.0, individuals reaching age 72 in 2023 are no longer required to take an RMD for 2023 (which would have been due by April 1, 2024) and must instead first take an RMD for 2024 (due by April 1, 2025).

Time-sensitive issue: Due to the late date upon which SECURE 2.0 was enacted in 2022, plan sponsors and financial institutions may not have had time, for example, to make the necessary programming changes to stop notices or statements from being sent to individuals turning age 72 in 2023 stating that they must take an RMD for 2023. Such information would now be incorrect under SECURE 2.0. Similarly, some individuals turning age 72 in 2023 may have already taken a distribution from their plan or IRA in 2023 for the purpose of satisfying their RMD requirement because they were unaware of the change made by SECURE 2.0.

Guidance requested: We urge Treasury to promptly issue transition relief under section 107 of SECURE 2.0 that is functionally equivalent to the relief Treasury issued in 2020 following the previous increase in RMD age from 70½ to 72 under the SECURE Act of 2019 (IRS Notice 2020-6 and Notice 2020-51). Such relief would include the following:

- Relief for a financial institution that provided an RMD statement to an IRA owner who attains age 72 in 2023 (including by providing a Form 5498). Under such relief, for example, the IRS would not consider such a statement to have been provided incorrectly if the IRA owner is notified by the financial institution no later than April 1, 2023, that no RMD is required for 2023.
- Relief for a payor and plan sponsor if a participant who attains age 72 in 2023 received a distribution in early 2023, and part of the distribution was not treated as an eligible rollover distribution because it was improperly characterized as an RMD. Under such relief, for example, the payor and plan administrator in such case would not be considered as having failed to satisfy the requirements of sections 401(a)(31), 402(f), and 3405(c) merely because of that treatment.
- An extension of the 60-day rollover deadline (to a deadline at or near the end of the year) for certain distributions from a plan or IRA made in 2023 that would have been an RMD but for the change in RMD age from 72 to 73.
- Allowing for the repayment of RMDs from an IRA. Under such relief, for example, in the case of an IRA owner or beneficiary who already received a

distribution of an amount that would have been an RMD in 2023 but for SECURE 2.0, the recipient would be allowed to repay the distribution to the distributing IRA, even if the repayment is made more than 60 days after the distribution, provided that the repayment is made no later than a deadline at or near the end of the year. Also, under such relief, repayments would generally be treated as a rollover for purposes of Code section 408(d)(3), but not as a rollover for purposes of the one rollover per 12-month period limitation and the restriction on rollovers for non-spousal beneficiaries.

ROTH EMPLOYER MATCHING OR NONELECTIVE CONTRIBUTIONS (SECTION 604)

Summary of relevant change: SECURE 2.0 provides that a 401(a) plan, 403(b) plan, or governmental 457(b) plan may permit an employee to designate vested employer matching or nonelective contributions as designated Roth contributions. This optional feature applies to contributions made after December 29, 2022.

Time-sensitive issues: Employers choosing to allow employees to designate employer contributions as Roth contributions need immediate guidance on the taxation, withholding, and reporting requirements that apply to such contributions. Guidance on whether this option is available to participants who are partially vested would also be helpful.

Guidance requested: To ensure the fair and appropriate tax treatment of Roth employer contributions that is also administrable for employers, the Council recommends that Treasury issue guidance providing that Roth employer contributions are:

- not wages for income tax withholding or other purposes;
- excluded from wages for FICA purposes;
- taxable in the year of contribution, even if the contribution is made with respect to the prior plan year, except in the case of matching contributions made at the same time as the related elective deferral or other employee contribution;
- reported on Form 1099-R; and
- treated in the same manner as elective Roth contributions to the same plan for purposes of section 402A(d)(2), rather than as rollovers subject to section 402A(c)(4), so that the five-year period begins on the date that the first Roth amounts of any type are contributed to the plan.

We would also ask for clarification regarding whether Roth employer contributions may be made on behalf of employees who are partially vested in their employer contributions. In addition, it would be helpful for guidance to clarify that providing this option only to vested employees, as required by law, does not raise any nondiscrimination issues with respect to the testing of benefits, rights, and features. Of course, employers should be permitted, but not required, to allow employees to elect to have part of their employer contributions treated as Roth, rather than all or nothing.

Our reasons for the recommendations provided above are as follows:

First, a participant's election to have employer contributions be made on a Roth basis is the economic equivalent of making an in-plan Roth conversion. To ensure consistency and the administrability of section 604, our members believe that Roth employer contributions and in-plan Roth conversions should be treated similarly by employers for purposes of the determination of whether they are wages. We thus recommend that Roth employer contributions, although of course subject to income tax, should not be treated as wages and thus are not subject to income tax withholding. We believe it is also clear that Roth employer contributions should be excluded from wages for FICA purposes, as they are not made under a qualified cash or deferred arrangement and thus would not be subject to Code section 3121(v)(1). Such a result for FICA purposes is also necessary in order to be consistent with the tax treatment that applies if an employee receives pre-tax employer contributions and then makes an in-plan Roth conversion.[1]

The Roth employer contributions must generally be taxable in the year of contribution based on the fact that individuals are cash basis taxpayers. This is also the only way to make this provision work. For example, in many cases, the amount of the employer contribution is not known in the year preceding the year of contribution, such as in the case of discretionary matching or nonelective contributions (or contributions contingent on being employed on the last day of the year). Treating Roth employer contributions as taxable in the year preceding the year of contribution would force many early-filing individuals to have to file amended returns for that year. We further recommend that Treasury issue guidance providing that Roth employer contributions are reported on Form 1099-R, which would, again, be consistent with in-plan Roth conversions.

Finally, we ask that Treasury issue guidance clarifying whether participants who are partially vested may elect to have a partial amount of employer contributions made on their behalf contributed as a Roth amount. For example, may a participant who is 40% vested elect to have up to 40% of the employer contributions made on her behalf contributed as a Roth amount? In addition, please confirm that limiting Roth employer contributions to vested amounts, as required by law, would not raise any

[1] Although our focus above is on income tax withholding and the exclusion of Roth employer contributions from wages for FICA purposes, we recommend that Treasury issue guidance providing that employers should not treat Roth employer contributions as wages for any purpose.

nondiscrimination issues or concerns with respect to benefits, rights, and features testing under Treasury regulation section 1.401(a)(4)-4.

EXPANDING AUTOMATIC ENROLLMENT (SECTION 101)

Summary of relevant change: Unless an exception applies, SECURE 2.0 requires 401(k) and 403(b) plans that are "established" on or after December 29, 2022, to include automatic enrollment and automatic escalation, effective for the 2025 plan year.

Time-sensitive issue: Guidance is needed regarding what it means for a plan to have been "established" on or after December 29, 2022. This guidance is critical so that employers can be fully informed with respect to whether taking certain plan-related actions (such as merging their grandfathered plan into a MEP or PEP), or the timing of such actions, will affect whether the new requirement applies to their plan beginning in 2025.

Guidance requested: Please confirm the following:

- A plan is clearly "established" when it is adopted. Thus, a plan that was adopted prior to December 29, 2022, is treated as established prior to December 29, 2022, even if the plan was not effective until on or after December 29, 2022 (e.g., January 1, 2023). As discussed below, the term "established" can have different meanings. In the context of section 101, it is clear that the term should be interpreted to mean "adopted." Grandfather rules are intended to protect those taking actions prior to the grandfather date; adopting a plan is an action that should clearly be protected.
- A plan that was established prior to December 29, 2022, but is later merged into another plan, including a pooled employer plan ("PEP") or other type of multiple employer plan ("MEP"), does not lose its grandfather status (or cause the other plan to lose its grandfather status). There is no reasonable reading of the statute under which a plan that is adopted prior to December 29, 2022 and then is merged into another plan, including a PEP or MEP, on or after December 29, 2022, would lose its grandfather status. Although the statute clearly prevents employers *without* a plan from taking advantage of a grandfathered MEP to avoid the new requirement, that provision has no applicability to an employer merging a pre-existing grandfathered plan into the MEP.
- A plan that is spun off from a grandfathered plan continues to retain its grandfather status. This scenario is similarly clear under the statutory text and as a matter of policy. For instance, if a segment of a pre-existing grandfathered plan (e.g., the accounts attributable to one division of a business enterprise) were spun out of that plan and/or merged into another plan, including a PEP or a MEP, the

spun-off accounts would retain their grandfathered status for purposes of the new requirement.

- Similarly, the merger of a plan that is subject to section 101 of SECURE 2.0 (i.e., a plan that is established on or after December 29, 2022 where no other exemption applies) into a plan that is grandfathered and that is maintained by the same employer, where the grandfathered plan is the surviving plan, will not cause the grandfathered plan to be considered as "established" on or after December 29, 2022 and to lose its grandfathered status. This will come up frequently, for example, in acquisition situations where a large company with a grandfathered plan purchases a small company that has a post-enactment plan. The large company could easily preserve the grandfather status of its previously existing plan by freezing the acquired plan and covering the acquired company's employees prospectively under the existing plan. But there is no reason to require the company to go to the expense of maintaining a frozen plan indefinitely. Where the grandfathered plan is the surviving plan, the grandfather should be preserved.
- It is clear that for purposes of new section 414A, all related employers under Code section 414(b), (c), and (m) are treated as a single employer. Otherwise, it would be simple to avoid the new requirement by forming multiple employers with 10 or fewer employees. Similarly, all related employers should be treated as a single employer for purposes of the grandfather rule. Thus, for example, if a grandfathered plan is maintained by an employer (either directly or through a MEP or a PEP), then opening up that plan to employees of any related company should not be treated as a new plan, but rather as an expansion of the grandfathered plan to cover more employees of the same employer.

CATCH-UP CONTRIBUTIONS REQUIRED TO BE ROTH (SECTION 603)

Summary of relevant change: SECURE 2.0 generally provides that a 401(k), 403(b), or governmental section 457(b) plan that permits an eligible participant to make catch-up contributions must require such contributions to be designated Roth contributions made pursuant to an employee election. This requirement is limited to an eligible participant whose wages for the preceding calendar year exceed $145,000. These changes apply beginning in 2024.

Time-sensitive issues: Section 603 makes two conforming amendments that are in need of technical corrections:

- The conforming amendment in section 603(b)(1) strikes Code section 402(g)(1)(C), which eliminates ***all*** catch-up contributions over the regular 402(g) limit, whether as a pre-tax contribution or a Roth contribution.

- The conforming amendment in section 603(b)(2) that amends Code section 457(e)(18)(A)(ii) also needs a correction in order to enable participants whose wages in the prior year did not exceed $145,000 to make pre-tax section 414(v) catch-up contributions (if greater than the special section 457(b) catch-up limits).

Guidance requested: Until Congress can enact the necessary technical corrections to section 603, please issue guidance stating that Treasury will apply the law as though the anticipated technical corrections have been made. Treasury clearly has the authority to anticipate technical corrections and has done so many times in the past.[2]

ENHANCEMENT OF START-UP CREDIT (SECTION 102)

Summary of relevant change: SECURE 2.0 enhances the existing retirement plan start-up credit in part by adding a new credit for defined contribution plans that equals a percentage of the amount contributed by the employer on behalf of employees for the taxable year, up to a per-employee cap of $1,000 applied on an employee-by-employee basis, as we understand it. No credit is permitted, however, with respect to contributions made on behalf of an employee whose FICA wages for the taxable year exceed $100,000 (indexed). The credit is available for the taxable year during which the plan is "established" and the following four years. This credit is available for taxable years beginning after 2022.

The same section of SECURE 2.0 also increases the existing credit amount from 50% of certain expenses to 100% for employers with up to 50 employees.

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[2] See, e.g., IRS Notice 2007-99 ("Because of these pending technical corrections and special considerations involving eligible retired public safety officers, Notice 2007-7, Q&A-23, is being modified."); IRS Notice 98-20 ("Like Notice 97-59, this notice takes into account the pending retroactive legislative corrections."); IRS Notice 97-59 ("The chairmen and ranking members of both the House Ways and Means Committee and the Senate Finance Committee have advised the Department of the Treasury of their intent to pursue technical corrections legislation . . .
Such legislation has already been approved by the House Ways and Means Committee. . . . This notice . . . describes how the Internal Revenue Service is taking into account the pending retroactive legislative corrections in administering the provision."); IRS Announcement 86-76 (The necessary "technical amendment of section 4940(e) still has not been enacted, but the provision is noncontroversial and its eventual enactment is certain. The Service has been assured by the staff of the Joint Committee on Taxation that the amendment, when enacted, will be retroactive to tax years beginning in 1985. The Service designed Part V of the 1985 Form 990-PF anticipating this law change to obviate the need for the filing of amended returns."); IRS Announcement 85-63 ("Anticipating that the technical correction will have retroactive effect, the Service has determined that it would not be appropriate to impose the penalty if the required installment payment is made on, or before, June 17 by taxpayers expected to be covered by the correction.").

Time-sensitive issue: Because the enhanced tax credit is already available, confirmation of Treasury's views on the following issues is needed.

Guidance requested:

- Because the changes apply to taxable years beginning after 2022 (rather than plans established after 2022), we believe that both aspects of section 102 of SECURE 2.0 apply to plans established before the effective date, but within the three or five-year credit periods. For example, a plan adopted in 2022 should be eligible for the credit for the remaining periods starting in 2023, so that the changes would apply for two and four years, rather than three and five, because 2022 preceded the effective date.
- For purposes of the contribution-based credit, a plan should be treated as "established" in the year in which it is effective. If a plan is treated as established in the year in which it is adopted, and the plan is adopted in a year prior to the year it is effective (which is very common), then in many cases, the employer will by definition only have four years of credit, rather than the clearly intended five years.
- Please confirm the treatment of partners and sole proprietors as employees for purposes of the new credit with respect to employer contributions.
- Please clarify how this rule applies where the employer's tax year is different from the plan year.

QLAC Reforms (Section 202)

Summary of relevant change: Qualifying longevity annuity contracts ("QLACs") are generally deferred annuities that begin payment at or near the end of an individual's life expectancy. The QLAC regulations limit the premiums an individual may pay for a QLAC to the lesser of (1) $155,000 (2023) and (2) 25% of the individual's account balance under the plan or IRA.

Among other QLAC-related changes, SECURE 2.0:

- repeals the 25% limit and raises the dollar limit to $200,000, effective for contracts purchased or received in an exchange on or after the date of enactment; and
- clarifies that, effective retroactively to the date of the original QLAC regulations, a divorce occurring after a QLAC is purchased but before payments commence will not affect the permissibility of the joint and survivor benefits previously purchased under the contract if a qualified domestic relations order ("QDRO")

(in the case of a retirement plan) or a divorce or separation instrument (in the case of an IRA) meets certain requirements.

Time-sensitive issues: The following items with respect to the changes described above are unclear:

- What it means for a QLAC to be received in an exchange; and
- What verification, if any, an IRA issuer must obtain with respect to whether a divorce or separation instrument meets the requirements with respect to the new spousal joint and survivor rule.

Guidance requested: Please issue guidance that:

- clarifies that insurers may do an internal exchange by replacing an existing QLAC with a new one that reflects the premium limits under SECURE 2.0; and
- provides that IRA issuers may rely on a representation from the taxpayer that a divorce or separation instrument satisfies the requirements for the new spousal joint and survivor rule.

SEP AND SIMPLE ROTH IRAS (SECTION 601)

Summary of relevant change: Beginning in 2023, SECURE 2.0 newly allows SEP IRAs and SIMPLE IRAs to be designated as Roth IRAs. An employee must elect for the contributions made by or on behalf of the employee to be treated as made to a Roth IRA, based on rules to be established by the IRS.

Time-sensitive issues:

- Although it appears that an employer would not be required to offer the Roth election, the statute is not clear on this point.
- Also, under SECURE 2.0, technically, all employer and employee SIMPLE and SEP contributions reduce the limit on Roth IRAs, effective for 2023, thus harming participants in existing pre-tax SIMPLEs and SEPs as well as in new pre-tax and Roth SIMPLEs and SEPs. This is the case because section 601(a) of SECURE 2.0 repeals subsection (f) of Code section 408A. Repealing subsection (f)(1), which prohibited Roth SEPs and SIMPLEs, made perfect sense. But repealing subsection (f)(2) appears to be a glitch, because subsection (f)(2) was the rule preventing SEP and SIMPLE contributions from counting against the Roth IRA limit (generally $6,500 in 2023, $7,500 for age 50 and older).

Guidance requested:

- Please confirm that employees may only designate their SEP or SIMPLE as a Roth IRA if their employer chooses to make such option available. No other outcome would make any sense from a plan administration standpoint, and in no other plan is a Roth decision made unilaterally by the employee without the employer permitting it in the plan.
- With respect to employer Roth contributions, we ask for the same treatment as the treatment requested above regarding other employer Roth contributions, such as with respect to withholding and the year of taxation.
- We ask that Treasury confer with Congress on whether the apparent glitch described above is in fact a glitch that is expected to be corrected. If so, we ask that Treasury announce that it will enforce the law in accordance with the anticipated technical correction. Such announcement could cite Treas. Reg. sec. 1.408A-3, Q&A-3(c)(2) as the authority for enforcing the law in accordance with the anticipated technical correction; that regulatory provision states that SEP and SIMPLE contributions do not reduce the Roth IRA limit.[3]
- We also ask that the Form 5305-SEP, Form 5304-SIMPLE, and Form 5305-SIMPLE be updated to address the new rules.

CASH BALANCE PLAN PROJECTIONS (SECTION 348)

Summary of relevant change: SECURE 2.0 provides that, solely for purposes of the backloading rules, the interest crediting rate that is treated as in effect and as the projected interest crediting rate is a reasonable projection of such variable interest rate, subject to a maximum of six percent. This provision is effective for plan years beginning after the date of enactment.

Time-sensitive issue: It appears that the anti-cutback relief provided under SECURE 2.0 permits a cash balance plan to delete a minimum interest crediting rate that was inserted to satisfy the backloading rules, but is no longer needed in light of this change. In many cases, though not all, this same result could be achieved through a wear-away amendment. But such an approach is complicated and expensive, and would affect different plans differently for no reason. Treasury has the authority to permit the right answer – deletion of minimum crediting rates inserted solely to satisfy a repealed rule.

Also, the projection rule for backloading purposes would be an appropriate way to project crediting rates for purposes of sections 415, 416, and 401(a)(26), and non-discrimination testing.

[3] See also the citations in footnote 2.

Guidance requested: We request that Treasury clarify that a cash balance plan may delete a minimum interest crediting rate in the scenario described above. In addition, we believe that the projection method for backloading purposes is a very reasonable and workable approach, and we ask Treasury to consider this as an approach for purposes of sections 415, 416, and 401(a)(26), and non-discrimination testing.

RECOVERY OF RETIREMENT PLAN OVERPAYMENTS (SECTION 301)

Summary of relevant change: SECURE 2.0 generally allows plan fiduciaries to decide not to recoup overpayments that were mistakenly made to participants. In addition, such inadvertent overpayments may be rolled over if they are otherwise eligible rollover distributions, to the extent the plan does not seek recoupment. If plan fiduciaries choose to recoup overpayments, then limitations and protections on the amount and manner of the recoupment apply to protect participants. This provision is effective as of the date of enactment.

Time-sensitive issue: It is unclear how the effective date applies with respect to prior overpayments.

Guidance requested:

- Please confirm that, with respect to the rollover aspect of this provision, the new rules apply to inadvertent overpayments made prior to the date of enactment, so that a rollover of an inadvertent overpayment made before the date of enactment may be treated as having been paid in an eligible rollover distribution (if it otherwise qualifies as such). For example, if an overpayment was made in early 2022 and was rolled over, except to the extent that recoupment is sought, such a rollover should be considered valid under SECURE 2.0 and not treated as a non-rollover contribution, which could result in an excess contribution and excise tax for 2022.
- To the extent that EPCRS is not inconsistent with the new rules in section 301 of SECURE 2.0, we assume everything else in EPCRS remains in effect. Confirmation of this point would be helpful.
- Please confirm that there is no need to recoup inadvertent overpayments that are in excess of the section 415 limits or that are due to a violation of section 401(a)(17). New section 414(aa)(4) requires observation of the limits of sections 401(a)(17) and 415. We interpret this provision as simply clarifying that a plan cannot be amended to permit distributions in violation of Code section 401(a)(17) or 415; this clarification is needed to override section 414(aa)(1)(B) in this respect. If section 414(aa)(4) were to be interpreted to require recoupment of such overpayments, it would overrule a key objective of the provision, since

inadvertent section 415 overpayments are such a common source of overpayments.

SELF-CORRECTION OF INADVERTENT PLAN AND IRA FAILURES (SECTION 305)

Summary of relevant change: SECURE 2.0 generally provides that any inadvertent failure by a plan to comply with the applicable rules under Code sections 401(a), 403(a), 403(b), 408(p) or 408(k) may be self-corrected under EPCRS without a submission to the IRS. SECURE 2.0 also directs the Secretary of the Treasury to expand EPCRS to allow IRA custodians to address inadvertent failures with respect to an IRA. This provision is generally effective as of the date of enactment.

Time-sensitive issue: Although we assume that the ability to self-correct most inadvertent failures is available as of the date of enactment without regard to when the failure occurred, the statute does not explicitly address this point.

Guidance requested: Please confirm that the provision applies to failures without regard to whether they occurred before the date of enactment. This would be consistent with the very sensible manner in which the periodic updates to EPCRS have been applied. When EPCRS is updated, the revised procedures are not limited to new failures occurring on or after the date the revisions are released. Any other rule would be very hard to administer, particularly as many failures occur over a period of time.

ELIMINATING THE INCENTIVE NOT TO PARTIALLY ANNUITIZE (SECTION 204)

Summary of relevant change: Prior to SECURE 2.0, the individual account rules under the RMD regulations did not account for the fact that, in the vast majority of cases, annuity payments exceed the RMD amounts that would have been required under the individual account rules. Under SECURE 2.0, where a portion of an interest in a retirement plan is distributed in the form of annuity payments, and those annuity payments exceed the amount that would be required to be distributed under the individual account rules based on the value of the annuity, then the excess annuity payment amount for a year may be applied toward the RMD for the year with respect to any remaining interest in the same retirement plan or IRA. This provision is effective as of the date of enactment; however, until guidance is issued, taxpayers may rely upon their reasonable, good faith interpretation of the provision.

Time-sensitive issue: In order to benefit from this new rule, individuals need to know the fair market value of any annuity with respect to which any excess annuity payment for the year may be used to reduce the RMD amount required to be taken from the remaining plan (or IRA) account balance.

Guidance requested: Until guidance is issued under this provision, please confirm that a reasonable, good faith interpretation of this provision includes taxpayers' ability to rely on any reasonable fair market value provided by the annuity issuer or plan, such as on a benefit statement or Form 5498, or by an appropriately qualified actuary that the individual or plan retains to determine the value.

EXPANSION OF IRA CHARITABLE DISTRIBUTION RULE (SECTION 307)

Summary of relevant change: Certain IRA distributions to a charity may be excluded from income up to $100,000 annually. SECURE 2.0 expands the IRA charitable distribution provision to allow for a one-time distribution to charities through charitable gift annuities, charitable remainder unitrusts, and charitable remainder annuity trusts, subject to a limit of $50,000 (indexed). This provision is effective for distributions made in 2023 and subsequent taxable years.

Time-sensitive issue: It is not clear whether the $50,000 one-time distribution is subject to the overall $100,000 limit.

Guidance requested: Please confirm whether the $50,000 one-time distributions to a split-interest entity are subject to, or separate from, the $100,000 limit.

EXCEPTION TO 10% ADDITIONAL TAX FOR TERMINALLY ILL INDIVIDUALS (SECTION 326)

Summary of relevant change: SECURE 2.0 provides a new exception to the 10% additional tax on early withdrawals for terminally ill individuals, effective for distributions made after enactment. In order for the exception to apply, the individual must give the plan administrator "sufficient evidence" of the illness, as the IRS requires. Distributions to which the new exception applies may be repaid to the plan or IRA under rules similar to the repayment rules applicable to qualified birth or adoption distributions.

Time-sensitive issues:

- The statute does not address what constitutes "sufficient evidence" for purposes of determining whether a distribution is eligible for the new exception.
- IRA issuers may soon receive (or may have already received) contributions to an IRA that are purported to be in repayment of an early distribution taken on account of a terminal illness. IRA issuers, however, are generally unable to track or verify whether the contribution is a compliant repayment. This may be the case even with respect to the same IRA from which the distribution was taken

because IRA issuers generally do not track and match distributions and repayments.

Guidance requested: We request the following guidance:

- Until the IRS provides guidance on what "sufficient evidence" is required, plans and plan administrators need relief from reporting penalties as long as any reasonable evidence of terminal illness was obtained by the plan administrator, including self-certification to protect individuals' privacy.
- There is no requirement that a plan administrator review evidence of a terminal illness. In all cases, an individual who meets the definition of terminally ill should be entitled to the exception from the 10% additional tax without providing documentation to a plan administrator.
- The new rule by its terms applies to all types of plans, including defined benefit plans, and we ask that this be confirmed.
- IRA issuers should be permitted to rely on a representation from the taxpayer that a contribution is a compliant repayment, including when the distribution that is being repaid was taken from the same IRA to which it is being repaid.

REASONABLE GOOD FAITH COMPLIANCE STANDARD

Pending the issuance of guidance on SECURE 2.0, we ask for confirmation that reasonable good faith compliance constitutes compliance with the new rules.

Sincerely,

Lynn D Dudley

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy

cc:
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