AMERICAN BENEFITS COUNCIL

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Delivered via email

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Re: Additional Guidance Needs Under SECURE 2.0

Dear Carol and Rachel:

The enactment of the SECURE 2.0 Act of 2022 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 U.S. Treasury Department and the Internal Revenue Service (collectively referred to as "Treasury") and the U.S. Department of Labor (DOL) with respect to many of SECURE 2.0's provisions.

The American Benefits Council ("the Council") is writing to follow up on our February 7, 2023, letter[1] to you in which we identified what we believed to be the most important, time-sensitive issues on which guidance from Treasury is needed with respect to certain provisions of the SECURE 2.0 Act of 2022. The items addressed in our February 7 letter generally had a 2023 or earlier effective date, or otherwise had immediate implications for plan sponsors, service providers, and other stakeholders.

In our February 7 letter, we noted that the Council would follow up with additional SECURE 2.0 items for which guidance is needed, but where such need was not as immediate. This letter serves as the first such follow-up letter, with a focus on SECURE 2.0 provisions that are generally effective beginning in 2024 or 2025. In addition, the Council's members have, with the benefit of more time for consideration, identified

[1] https://www.americanbenefitscouncil.org/pub/?id=C14CE351-960C-0886-F5E1-ED9D3490CC28

some additional time-sensitive guidance needs with respect to SECURE 2.0 provisions that are already effective or that otherwise have immediate implications. We begin below by addressing those supplemental requests for more immediate guidance. We hope this letter is helpful as Treasury continues to identify and prioritize its SECURE 2.0 guidance projects.

I. SUPPLEMENTAL REQUESTS: PROVISIONS FOR WHICH IMMEDIATE GUIDANCE IS NEEDED

ADDITIONAL CREDIT FOR EMPLOYER CONTRIBUTIONS (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 the "applicable 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. 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 applicable percentage is 100% in the first and second years, 75% in the third year, 50% in the fourth year, 25% in the fifth year, and 0% in any taxable year thereafter. Thus, no credit is available after the fifth year. The full additional credit is limited to employers with 50 or fewer employees; the credit is phased out for employers with between 51 and 100 employees in the preceding taxable year.

Time-Sensitive Issue

Because the additional tax credit for employer contributions is already available, plan sponsors need confirmation with respect to the operation of the phaseout for employers with between 51 and 100 employees in the preceding taxable year.

Guidance Requested

Please confirm how the phaseout operates for employers with 51-100 employees. Our understanding of the phaseout is as follows: assume that an employer contributed $1,000 each for 20 employees who each make $100,000 or less, for a total of $20,000 of contributions. In the third year after the year of adoption of the plan (i.e., the fourth credit year), the applicable percentage is 50%. That is multiplied by $20,000 for a total of $10,000, which is the credit amount before the phaseout is applied based on the number of employees. If the employer had 51 employees in the preceding taxable year, then that $10,000 amount is reduced by 2% (i.e., (51-50 employees) x 2%), for a final credit

amount of $9,800. If the employer had 100 employees in the preceding taxable year, then that $10,000 amount is reduced by 100% (i.e., (100-50 employees) x 2%) to $0 because the credit is entirely phased out.

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. Exceptions to this requirement include new employers that have been in existence for less than three years and small businesses until the date that is one year after the close of the first taxable year with respect to which the employer maintaining the plan "normally employed more than 10 employees."

Time-Sensitive Issues

- Guidance is needed regarding when a small employer that reaches the threshold of normally employing more than 10 employees is required to include automatic enrollment and automatic escalation in the plan. For example, if a calendar-year small employer that has been in existence for more than three years first normally employed more than 10 employees in 2026, then technically under the statute, the employer would be required to add automatic enrollment and automatic escalation one year after December 31, 2026, which would be December 31, 2027. We believe that Congress may have intended, however, for the requirements to apply beginning January 1, 2028, which would make much more sense from a plan administration standpoint.

- Guidance is needed regarding when a new business that was initially excepted from the requirements to include automatic enrollment and automatic escalation because it was in existence for less than three years, surpasses that three-year mark and thus is required to include such features.

- Guidance is also needed for plans that are established on or after December 29, 2022, and before January 1, 2025, as it is not clear whether all participants without an affirmative election will be subject to automatic enrollment effective for the 2025 plan year, or only those participants who are newly eligible on or after January 1, 2025. Similar guidance is needed for small employers and new employers that establish plans prior to losing their exemption because they are no longer a small or new employer, respectively.

Guidance Requested

- We ask Treasury to issue guidance providing that an employer that newly becomes subject to the requirements under Section 101 of SECURE 2.0 by reason of normally employing more than 10 employees must meet such requirements as of the first day of the first taxable year that follows the date that is one year after the close of the first taxable year with respect to which the employer maintaining the plan normally employed more than 10 employees.

- We ask Treasury to issue guidance providing that an employer that becomes subject to the requirements of Section 101 by reason of being in existence for three years must meet such requirements as of the first day of the first taxable year that follows the date that is one year after the close of the first taxable year during which the employer meets the three-year rule.

- We also ask that Treasury issue guidance addressing which participants are subject to the automatic enrollment and automatic escalation requirement in the case of (1) a plan that was established on or after December 29, 2022, and before January 1, 2025, or (2) a small employer or new employer that established a plan prior to losing its exemption.

RECOVERY OF RETIREMENT PLAN OVERPAYMENTS (SECTION 301)

Summary of Relevant Change

Section 301 of SECURE 2.0 generally allows plan fiduciaries to decide not to recoup overpayments that were mistakenly made to participants. SECURE 2.0 amends the Internal Revenue Code ("Code") to clarify that a plan will not fail to be treated as a Code Section 401(a) plan, 403(a) plan, 403(b) plan, or governmental plan merely because the plan fails to recoup an "inadvertent benefit overpayment" or the plan is amended to increase past or decrease future benefit payments to adjust for prior inadvertent benefit payments. This provision was effective as of December 29, 2022, the date of enactment of SECURE 2.0.

Time-Sensitive Issues

Section 301 of SECURE 2.0 does not define several terms that are pertinent to implementing the new provision.

Guidance Requested

In coordination with DOL, please provide guidance on the meaning of the following terms as used in the amendments that Section 301 of SECURE 2.0 made to the Code and/or ERISA:

- "Inadvertent benefit overpayment." For example, does the term include a premature distribution, or a distribution that is inadvertently paid in a lump sum and that should have been paid as an annuity? As another example, does the term include the release of plan loan proceeds as a result of an inadvertent administrative error, such as in cases where the loan results in a participant exceeding the limit on the number or total dollar amount of loans that may be taken? If it is determined that Section 301 applies with respect to an impermissible disbursement of a loan, then we assume that the plan would still have to collect loan repayments at the scheduled rate with interest, but the impermissible disbursement would not have to be immediately undone.

- The "hardship" to be taken into account in determining the amount of a proposed recoupment, and whether to rely on hardship withdrawal standards.

- When a participant is "culpable," such that the participant is not entitled to all the protections of Section 301, including when a participant had "good reason to know under the circumstances" that the participant was overpaid, and whether a participant's financial literacy is relevant in making this determination. Further, unless a plan specifically excludes from coverage undocumented immigrants, an employee's misrepresentation as to his or her status should not be regarded as a fraudulent act or misrepresentation. So long as such individual's benefit has been calculated correctly and distributed in a proper form at an appropriate time, the fact that the individual should not have been hired should not cause any benefit payment received by him or her to be regarded as a benefit overpayment.

- In the context of pursuing recoupment via litigation, what it means for a responsible plan fiduciary to "[make] a determination that there is a reasonable likelihood of success to recover an amount greater than the cost of recovery."

- Please address what is meant by the phrase "past overpayment of a non-decreasing annuity." For example, does this include an overpayment that was in the form of an annuity, or an overpayment that occurred when the benefit actually payable should have been an annuity?

Recognizing that the issuance of comprehensive guidance under Section 301 of SECURE 2.0 will require coordination between Treasury, DOL and the Pension Benefit Guaranty Corporation (PBGC), any temporary or interim guidance provided on the correction of overpayments under Section 301 should be flexible. We request that any such guidance provide maximum protection to fiduciaries who are acting in good faith and in accordance with their understanding of applicable law, including case law.

Related to a request in our letter of February 7,[2] we also ask that Treasury and IRS update the Employee Plans Compliance Resolution System (EPCRS) to reconcile the differences between EPCRS in its current form and Section 301 of SECURE 2.0.

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 Issue

Because SEP and SIMPLE Roth IRAs are technically permitted already beginning in 2023, guidance on several aspects of this change is needed by employers and IRA custodians and issuers.

Guidance Requested

In addition to the items described in our letter of February 7, 2023, such as the need to update Form 5305-SEP, Form 5304-SIMPLE, and Form 5305-SIMPLE, Council members have identified the following additional items on which guidance is needed:

- Although we assume the addition of a Roth option would require separate IRAs, confirmation of this point would be helpful.
- We ask that Form 5498 and Form 1099-R and their instructions be updated as necessary to implement the new option for SEP and SIMPLE Roth IRAs.

SMALL IMMEDIATE FINANCIAL INCENTIVES FOR CONTRIBUTING TO A PLAN (SECTION 113)

Summary of Relevant Change

Effective for plan years beginning after December 29, 2022, SECURE 2.0 exempts *de minimis* financial incentives from the contingent benefit rules and provides related relief from the prohibited transaction rules under the Code and ERISA.

[2] The Council's letter dated February 7, 2023, stated that, 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. We indicated that confirmation of this point would be helpful.

Time-Sensitive Issue

Although we believe it is clear that Section 113 applies to *de minimis* financial incentives provided by the employer or the plan, it is less clear whether this provision also exempts *de minimis* financial incentives from other parties, such as a service provider to the plan.

Guidance Requested

Please confirm whether Section 113 permits service providers to provide de minimis financial incentives to those who elect to participate in the plan.

CODE SECTION 420 TRANSFERS (SECTION 606)

Summary of Relevant Change

Prior to SECURE 2.0, Code Section 420 allowed employers with generously overfunded pension plans (i.e., very generally over 125% or 120% funded) to transfer a portion of a plan's surplus assets to fund retiree welfare benefits for the same population of pension retirees. Although Code Section 420 was scheduled to expire at the end of 2025, Section 606 of SECURE 2.0 extended the provision through the end of 2032. In addition, SECURE 2.0 newly permits Section 420 transfers (other than collectively bargained transfers) to be made to the extent that plan assets exceed 110% of the sum of the funding target and the target normal cost of the plan, rather than 125% or 120% under prior law. SECURE 2.0, however, requires additional safeguards with respect to such transfers, including that the funded threshold is only reduced to 110% for *de minimis* transfers of up to 1.75% of the plan's assets. Another condition of relying on the 110% threshold is that an employer must extend the cost maintenance period by two additional years (from five years to seven years). The changes made by Section 606 apply to transfers made after December 29, 2022.

Time-Sensitive Issue

Although we believe that Congress clearly intended for the two-year extension of the cost maintenance period for *de minimis* transfers of up to 1.75% of plan assets to only apply in the case of a plan that meets the 110% threshold (but not the 125% or 120% threshold), Code sections 420(e)(7) and 420(c)(3)(D) could be read as extending the cost maintenance period to *all de minimis* transfers, including those made by plans that are over the 125% or 120% threshold.

Guidance Requested

We request that Treasury issue guidance confirming that the rules for *de minimis* transfers under Code Section 420 only apply with respect to transfers in cases where the

plan does not qualify for a regular transfer by reason of being over 125% or 120% funded.

Related Issue

We also request clarification of a critical issue that has long been viewed as settled law. Under Code sections 420(e)(1)(C), 420(e)(1)(D), and 420(f)(6)(C), a Section 420 transfer can only be made on behalf of retired employees who "are entitled to pension benefits under the plan." This restriction is understandable. Congress intended surplus pension assets to be used for the same employees on whose behalf the pension plan was funded.

The question has been raised regarding whether a Section 420 transfer can be made on behalf of retirees whose pension benefits have been satisfied or "otherwise settled," such as through the payment of a lump sum, distribution of an annuity contract, or transferred to another plan in accordance with Section 414(l) of the Code. The issue is whether such retirees "are" entitled to pension benefits, since they are not entitled to present or future pension benefits yet they had accrued their pension benefits under the plan engaging in the Section 420 transfer. The IRS has squarely ruled that Section 420 transfers may have been made on behalf of participants whose benefits have been "otherwise settled."[3] In so ruling, the IRS relied heavily on its interpretation of Code Section 401(h), which similarly restricts benefits to employees who are "eligible to receive retirement benefits" or are retired by reason of permanent disability.[4] With respect to Section 401(h), the IRS stated:

There is no indication that the manner in which pension benefits are paid out is relevant for purposes of determining eligibility for benefits under Section 401(h). Thus, any employee who has received a distribution, is receiving a distribution, or who has retired and is entitled to receive a future distribution is a member of the class which is entitled to pension benefits under the plan, and as such, amounts can be set aside in a 401(h) account for them.

We understand that the IRS is considering not following the 2015 private letter ruling in future ruling requests. The law should not be suddenly changed to limit Section 420 and/or Section 401(h) to retirees currently or prospectively entitled to pension benefits. Such a change would deprive a huge number of participants of the security of having their retiree health benefits funded. On the contrary, the Section 420 rule was intended to ensure that those benefiting from the transfer were those on whose behalf the pension plan had been maintained and under which their pension benefits

[3] Private letter ruling 201511044 (December 19, 2014).

[4] Treas. Reg. sec. 1.401-14(b)(1).

had accrued. Whether a participant's pension benefits have been paid out or not should not make a difference. The 2015 private letter ruling recognized this principle.

Additional Guidance Requested

We ask that the permissibility of including in a Section 420 transfer welfare benefits for pension plan participants whose pension benefits have been paid out (by lump sum or annuity purchase) be confirmed in guidance of general applicability.

II. PROVISIONS GENERALLY EFFECTIVE IN 2024 OR 2025

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 exceeded $145,000. These changes apply beginning in 2024.

Issues

- Our members have indicated to us that a vast number of employers will not be able to comply with the new Roth catch-up contribution requirement by 2024 due to the significant programming, administration, and communication changes that are required to implement this provision. Unless the effective date of Section 603 of SECURE 2.0 is delayed, this inability of many employers to comply with the change will effectively force many plans to eliminate catch-up contributions in 2024 in order to avoid violating the provision.

- In addition to the need for more time, employers with plans that permit catch-up contributions need guidance on a range of issues in order to implement Section 603.

Guidance Requested

- ***Need for delayed effective date:*** The Council urges Treasury to delay the effective date of Section 603 by two years. We also urge Treasury to provide (1) an additional delay to give state and local governments time to consider and enact any needed legislation, and (2) an additional delay to avoid requiring changes during the term of a collective bargaining agreement.

Numerous Council members have expressed significant concerns over the practical inability to implement Roth catch-ups by 2024. As described in more detail in our paper dated June 7, 2023, the time and complexity involved in implementing Roth catch-ups is very substantial. Determining which participants are subject to the Roth requirement based on their prior year wages will require significant changes to both the plan's recordkeeping system and the employer's payroll system, as well as new coordination between the systems and the development of what will inevitably be complex new procedures. The implementation of Section 603 will be even more complex and time-intensive for the many plans that do not currently offer Roth contributions—this change alone will require many hours of programming and coordination amongst the employer and the plan's service providers. Our members are very concerned that these and other necessary tasks—including participant education and communication—cannot at this point be feasibly accomplished by 2024. Unless Congress or Treasury delays the effective date of Section 603, many of our members have indicated they may be left with no choice but to regrettably eliminate catch-up contributions from their plans at least for 2024.

- ***Roth catch-up requirement for all participants:*** Please issue guidance addressing whether a plan may *require* that all catch-up contributions be made on a Roth basis, including by those participants whose wages for the preceding calendar year did not exceed $145,000. We do not believe this option is in any way prohibited by the statute, and our members have indicated that the ability to require that all catch-up contributions be made on a Roth basis would significantly simplify the implementation of Section 603, thus encouraging more plan sponsors to retain (or add) catch-up contributions, which increase participants' ability to adequately accumulate savings for retirement, rather than eliminate catch-up contributions altogether in order to avoid the complexities and expense of complying with Section 603.

    - *Pre-approved plan documents:* In the event that Treasury guidance confirms that an employer may choose to require that all catch-up contributions be made on a Roth basis, regardless of prior year wages, please confirm that this option may be included in a pre-approved plan document.

- ***Participant elections:*** Please confirm that no separate election is necessary for Roth catch-up contributions provided that the employer communicates that any catch-up contributions made with respect to affected participants will be made on a Roth basis. Such communication should be permitted either as part of a more general communication or on a targeted basis.

- ***Limiting catch-up contributions:*** We request that Treasury confirm that it is permissible for a plan to limit catch-up contributions to participants who earned $145,000 or less in FICA wages for the prior year.

- ***Corrections:*** In the event that a participant erroneously makes a pre-tax catch-up contribution that was required to have been made on a Roth basis, guidance is needed regarding how a correction should be made. Such guidance is contemplated by the authority provided to Treasury under new Code Section 414(v)(7)(D). We recommend that plans be allowed to utilize any of the following correction methods: (1) reverse the pre-tax exclusion and provide a refund to the participant, (2) adjust and recharacterize the catch-up contribution as having been made on a Roth basis, or (3) issue a refund of the pre-tax amount by April 15th of the following year (with or without an adjustment for any gains or losses) for the pre-tax excess together with a Form 1099-R for the following year, which would not be subject to the 10% additional tax on early distributions.

    - ***Recharacterizations:*** In the event that a catch-up contribution originally made on a pre-tax basis is later recharacterized as having been made on a Roth basis, please confirm that such catch-up contributions are:

        - subject to income tax in the year the contribution is recharacterized as a Roth contribution, including in cases where such year is not the same year as when the contribution was deposited in the plan;
        - excluded from income tax withholding;
        - excluded from wages for other purposes; and
        - subject to Form 1099-R reporting.

    We also ask that no recharacterization be required in the case of a *de minimis* catch-up contribution of $250 or less.

- ***Safe harbor 401(k) plans:*** Please confirm that plan amendments made to comply with Section 603 do not constitute a prohibited mid-year change under IRS Notice 2016-16.

SURVIVING SPOUSE ELECTION OF UNIFORM LIFETIME TABLE FOR REQUIRED MINIMUM DISTRIBUTIONS (SECTION 327)

Summary of Relevant Change

Section 327 of SECURE 2.0 generally permits a surviving spouse who is the sole beneficiary of a deceased plan participant or IRA owner to elect to have required minimum distributions (RMDs) determined using the Uniform Lifetime Table, rather than the Single Life Table as required under current law. This change applies to calendar years beginning after December 31, 2023.

Issue

Clarification regarding certain aspects of Section 327 would be helpful.

Guidance Requested

- Please confirm that the new election for surviving spouses made available under Section 327 is an optional provision that plans may choose to offer.

- Please clarify whether the spousal election under Section 327 is available in cases where the participant died prior to the effective date of the change made by SECURE 2.0. For example, if a participant died in 2020 and the surviving spouse beneficiary was deferring the RMD until the participant would have reached his or her RMD age, may the surviving spouse in 2024 make the election to be treated as the employee and have the applicable distribution period be determined under the Uniform Lifetime Table? Further, will the election be available to those spouses who are currently taking RMDs using the Single Life Table?

- Please clarify the election rules under Section 327. For example, prior to the SECURE 2.0 change, in the event that the participant dies before the required beginning date, surviving spouses are generally subject to benefit commencement dates based on the deceased participant's date of birth and are treated as the employee. Under SECURE 2.0, an election is required in order for a surviving spouse to be treated in this favorable manner. In our view, under Section 327, a plan or IRA could provide that spouses are deemed to make the SECURE 2.0 election unless they affirmatively opt not to do so (or vice versa). Alternatively, we believe that a plan or IRA could choose to deem all spouses to have made the SECURE 2.0 election (or not to have made it), without an opportunity to opt out. In the latter case, and with respect to a plan that provides spouses with a choice today, confirmation would be helpful that deeming all spouses to have made the SECURE 2.0 election (or not to have made it), without an opportunity to opt out, does not raise anti-cutback concerns.

  We request that plans also be permitted to provide for such deemed elections with respect to surviving spouses where the participant dies on or after the required beginning date.

RMD TREATMENT OF IN-PLAN ROTH AMOUNTS (SECTION 325)

Summary of Relevant Change

SECURE 2.0 extends the pre-death RMD exemption for Roth IRAs to in-plan Roth amounts and exempts in-plan Roth amounts from the incidental death benefit

requirements. These changes generally apply to taxable years beginning after December 31, 2023.

Guidance Requested

Please confirm that the elimination of distributions that would have been treated as pre-death RMDs (but for Section 325) for in-plan Roth accounts is optional, though the distributions would no longer be treated as RMDs.

PENSION-LINKED EMERGENCY SAVINGS ACCOUNT (SECTION 127)

Summary of Relevant Change

SECURE 2.0 allows a 401(k), 403(b), or governmental 457(b) defined contribution plan to include a pension-linked emergency savings account (PLESA).

Issues

- Under the statute, no contribution to a PLESA may be accepted to the extent that such contribution would cause the portion of the account balance attributable to participant contributions to exceed the lesser of $2,500 or a lower amount set by the plan sponsor. The question has been raised regarding whether "the portion of the account balance attributable to participant contributions" includes earnings. The answer must be no, because if earnings were included, there would be no reason to refer to "the portion of the account balance." If earning were included, that would mean that the entire account balance would be taken into account.

- Under the statute, withdrawals are permitted at the discretion of the participant, subject to certain timing restrictions. There is no requirement for the participant to demonstrate or certify the existence of an emergency or other need.

- The statute does not specify which participants may be charged for the cost of maintaining the PLESA.

- The statute does not address the issue of whether the lifetime income disclosure rules of ERISA Section 105(a)(2)(D) apply to PLESAs.

- The statute defines an eligible participant as an individual who meets any age, service, or other eligibility requirements of the plan. In our view, the statute does not preclude allowing individuals to participate in the PLESA even if they are not eligible to participate in the retirement part of the plan, such as individuals who have not met the plan's general service requirement.

- The statute imposes certain requirements on how a PLESA may be invested, such as in an investment product designed to preserve principal. We are aware of no reason why money market funds or stable value funds could not be offered as investments.

- The statute permits employers to employ reasonable procedures to prevent manipulation of the rules with respect to matching contributions to the non-PLESA account under the plan. It is not clear (1) what employers are permitted to do, or (2) if there is anything employers must do to prevent employees from making PLESA contributions solely to get a matching contribution.

- The statute authorizes DOL to issue regulations establishing minimum standards for PLESAs in order to get ERISA preemption.

- One of the requirements of offering a PLESA is that, with respect to at least the first four withdrawals from the account in a plan year, there can be no fees or charges "solely on the basis" of such a withdrawal. Any subsequent withdrawals, however, may be subject to "reasonable fees or charges in connection with such a withdrawal, including reasonable reimbursement fees imposed for the incidental costs of handling of paper checks." The statute implies that fees *may* be charged on the first four withdrawals from a PLESA in a plan year provided that such fees are not charged "solely on the basis" of the withdrawal. It is not clear, however, what types of fees or charges are contemplated as being permitted in this regard. For example, if a recordkeeper ordinarily charges a check writing fee on any and all distributions from the plan, may that check writing fee be charged on the first four PLESA withdrawals in a plan year, so long as the fee is applied to withdrawals broadly and not solely with respect to withdrawals from PLESAs?

Guidance Requested

- Please confirm that earnings are not taken into account in applying the $2,500 (or lower) limit on a PLESA. In this regard, we also request guidance providing that contributions are treated as distributed first from a PLESA so as to avoid the administrative burden of prorating distributions between contributions and earnings.

- Please confirm that, to make a withdrawal, there is no need for a participant to demonstrate or certify the existence of an emergency or other need.

- Please confirm that the employer has discretion to charge the cost of the PLESA in any reasonable manner to all participants in the plan or only to participants in the PLESA.

- Please confirm that the lifetime income disclosure rules do not apply to PLESAs, which are generally intended to be emergency savings, not to provide retirement income.

- Please confirm that the statute does not preclude allowing individuals to participate in the PLESA even if they are not eligible to participate in the retirement part of the plan, such as individuals who have not met the plan's general service requirement.

- Please confirm that money market funds or stable value funds may be offered as PLESA investments.

- We ask that the agencies issue model plan language and notices pursuant to Section 127(f)(3) of SECURE 2.0.

- We recommend that the agencies not issue any guidance at this time regarding possible manipulation with respect to matching contributions. It is possible under current law for employees to make contributions to a retirement account solely to get a matching contribution and then take the money out immediately without the 10% early distribution tax (such as in the case of employees who have attained age 59½). That practice has not been an issue, so there is no reason to assume that this will be a problem in the case of PLESAs. Accordingly, we recommend waiting to see if this problem emerges in practice before issuing any guidance on it.

- We ask that DOL make it clear that it will not issue any required minimum standards in order for ERISA preemption to apply, at least until a compelling case is made for such minimum standards based on data collected over several years. Otherwise, the threat of the loss of preemption could chill the market for the establishment of PLESAs.

- Please issue guidance on what it means for a fee or charge to be assessed on a PLESA withdrawal in a manner that is not considered to be made "solely on the basis" of such withdrawal.

- Please issue guidance on the exclusion of HCEs. Some plans don't identify HCEs for nondiscrimination purposes until testing is underway, which typically happens after the plan year to which the HCE determination relates. However, it appears that plans offering PLESAs will need to identify HCEs at the beginning of the year to enforce this restriction, unless DOL and IRS provide more flexibility.

- Please issue guidance on corrections for the inadvertent inclusion of HCEs.

- Please address whether all PLESA contributions count toward the annual deferral limit, or whether only contributions up to the applicable PLESA contribution limit (in the event of offsetting withdrawals) count toward the limit. For simplicity, we request that plan sponsors have the option of electing to apply the PLESA contribution limit as an annual contribution limit.

- Please address how the prohibition on minimum contributions applies. May plans still require participant contributions to be in percentage increments, or must they allow small dollar contributions?

- Please address when plan sponsors must restart PLESA contributions after participants who reached the account limit take a withdrawal. May plan sponsors wait until the beginning of the next plan year?

- Will PLESA distributions need to be reported on 1099-R?

- How does PLESA automatic enrollment interact with a plan's existing automatic enrollment arrangement? May a plan sponsor count the up-to-3% PLESA contribution toward the plan's automatic enrollment rate, or are they separate contribution rates? How do permissible withdrawals under an eligible automatic contribution arrangement (EACA) work if the participant's initial contributions are all going to the PLESA?

PROTECTED BENEFITS AND IN-SERVICE WITHDRAWALS (VARIOUS PROVISIONS)

Background Summary of Relevant Change

Code Section 411(d)(6) provides an anti-cutback rule under which a participant's accrued benefits generally may not be decreased by an amendment to a plan. This includes a prohibition on eliminating certain optional forms of benefits. In some cases, Congress specifically provides that the termination of an optional benefit does not violate the anti-cutback rule. For example, Section 127 of SECURE 2.0, which allows a plan sponsor to add a PLESA to a plan, provides that, notwithstanding Code Section 411(d)(6), a plan that offers a PLESA may cease to offer such accounts at any time. In other cases, Treasury regulations specify certain benefits that may be eliminated or reduced.

SECURE 2.0 creates several new types of in-service distributions, including emergency personal expense withdrawals (Section 115), domestic abuse victim withdrawals (Section 314), qualified disaster recovery distributions (Section 331) and qualified long-term care distributions (Section 334).

Issue

The provisions in SECURE 2.0 creating the in-service distributions listed above do not specify whether they are protected benefits that may not be eliminated or reduced without violating Code Section 411(d)(6).

Guidance Requested

To the extent not already specified by Congress, guidance is needed on whether the new in-service distribution options in SECURE 2.0 may be eliminated or reduced by a plan amendment without violating the anti-cutback rule in Code Section 411(d)(6).

MID-YEAR TERMINATION AND REPLACEMENT OF SIMPLE IRAS (SECTION 332)

Summary of Relevant Change

Prior to SECURE 2.0, SIMPLE IRA plans were generally required to be maintained for the entire calendar year and mid-year terminations were not permitted. Section 332 of SECURE 2.0 changes current law, effective for plan years beginning after December 31, 2023, to provide that an employer may elect to terminate a SIMPLE IRA plan at any time during a year if the employer adopts a specified safe harbor 401(k) plan in its place. To make such an election, one of the requirements under Section 332 is that the employer must establish and maintain the safe harbor plan as of the day after the termination date of the SIMPLE IRA plan.

Issue

Section 332 of SECURE 2.0 does not contemplate mergers and acquisitions ("M&A") situations in which a SIMPLE IRA is being terminated and the affected employees will have access to the buyer's *existing* 401(k) plan (rather than a newly established safe harbor 401(k) plan).

Guidance Requested

We believe it would be consistent with congressional intent to issue guidance providing that an employer may terminate a SIMPLE IRA plan at any time during a year provided that the employer maintains a specified safe harbor 401(k) plan as of the day after the SIMPLE IRA plan's termination, regardless of whether that safe harbor 401(k) plan is newly established as of that day or the employer otherwise has such a plan in place, such as a pre-existing plan that is newly available as the result of M&A activities. There is no policy reason to provide that the current-law prohibition on mid-year terminations of SIMPLE IRA plans should continue to apply in M&A situations simply because an available safe harbor 401(k) plan was pre-existing and not newly established as of the day following the SIMPLE IRA plan's termination.

SAFE HARBOR FOR CORRECTING ELECTIVE DEFERRAL FAILURES (SECTION 350)

Background and Summary of Relevant Change

The EPCRS generally provides a system for retirement plan sponsors to correct plan errors. EPCRS includes special correction procedures that provide a temporary safe harbor for missed deferrals under a plan's automatic enrollment or automatic escalation feature. This temporary safe harbor is only available for failures that begin before 2024.

Section 350 of SECURE 2.0 provides a permanent safe harbor for plans or arrangements under Code Section 401(a), 403(b), 408 and 457(b) to prospectively correct failures related to an automatic contribution feature. Section 350 is effective for errors for which the required correction date is after December 31, 2023.

Issue

Section 350 appears to broadly provide relief to reasonable administrative errors "made in implementing an automatic enrollment or automatic escalation feature." The provision, however, requires a plan sponsor's corrective action to implement such feature "determined in accordance with the terms of an EACA. Although we do not believe that the relief provided by Section 350 was intended to be limited to plans with EACAs, it is not clear to us how the reference to the terms of an EACA is relevant in the case of a plan with an automatic enrollment or automatic escalation feature that is not an EACA.

Guidance Requested

Guidance is needed regarding how the reference to the terms of an EACA in Section 350 applies for purposes of the safe harbor in the case of a plan that includes an automatic enrollment or automatic escalation feature that is not an EACA.

STUDENT LOAN PAYMENTS (SECTION 110)

Summary of Relevant Change

Section 110 of SECURE 2.0 permits employers to make matching contributions under a 401(k) plan, 403(b) plan, governmental 457(b) plan, or SIMPLE IRA with respect to an employee's qualified student loan payments. One of the requirements that must be met in order for an employer to offer this feature is that, "under the plan, all employees eligible to receive matching contributions on account of elective deferrals are eligible to receive matching contributions on account of qualified student loan payments." Another requirement is that matching contributions on student loan payments may only be made at the same rate as matching contributions on elective

contributions. Section 110 is effective for contributions made for plan years beginning after December 31, 2023.

Issues

- It is not clear under SECURE 2.0 whether, in the case of plans covering multiple employers, business units, or divisions, the plan may implement the student loan matching feature with respect to some employers, business units, or divisions but not others. Although SECURE 2.0 could be viewed as requiring the student loan matching feature to be adopted on a plan-wide basis, it is not clear that this was the intended result for plans that cover multiple groups of employees.

- Guidance is needed on various aspects of implementation of the provision.

Guidance Requested

- We encourage Treasury to issue guidance clarifying that the decision to offer a student loan matching feature may be made on an individual employer, business unit, divisional, or other similar basis. We believe this makes sense from a policy perspective so that, in the event that one participating employer or group in the plan chooses not to add the student loan matching feature, that decision does not negatively affect other employers or other groups that would like to make the feature available to their employees.

- It should also be confirmed that in the case of a multiple employer plan (including a pooled employer plan), each employer is treated separately, so that one employer could adopt a student loan matching feature, without regard to whether other employers in the plan do so also.

- Please confirm that the employer has discretion to charge the cost of the student loan provision in any reasonable manner to all participants in the plan or only to participants participating in the student loan provision.

- Please provide guidance allowing a qualified student loan match to be made at a different frequency than the plan's standard match given the requirement to allow substantiation up to three months after the end of the plan year.

- Please confirm whether employees who terminate prior to the substantiation deadline may be excluded.

- Please issue guidance addressing how the ability to claim a student loan match up to three months after plan-year-end interacts with ACP and ADP testing for plans without EACAs (i.e., they won't be able to correct within the normal 2-1/2 month window).

REASONABLE GOOD FAITH COMPLIANCE STANDARD

As previously requested in our February 7 letter, pending the issuance of more complete guidance on SECURE 2.0, we again ask for confirmation that reasonable, good faith compliance constitutes compliance with the new rules.

Sincerely,

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

cc:
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