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January 23, 2020

Ms. Cathy Jones
Acting Director
Employee Plans Division
Internal Revenue Service
999 N. Capitol St, NE
Washington, DC 20002

Ms. Victoria Judson
Associate Chief Counsel
Tax Exempt and Government Entities
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Ms. Carol Weiser
Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

Re: Guidance Related to SECURE Act Effective Dates

Dear Ms. Jones, Ms. Judson, and Ms. Weiser:

The Investment Company Institute¹ writes to request immediate guidance and relief relating to certain changes to the Internal Revenue Code (“Code”) enacted under the Further Consolidated Appropriations Act of 2020 (“FCAA”). As you know, the FCAA (signed by the President on December 20, 2019) includes the Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE Act” or “Act”), which is a collection of provisions intended to improve the private-sector retirement system. The Institute supported the Act because it provides more tools for American families to save for and achieve a financially secure retirement. Among the many helpful changes,

¹ The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$24.7 trillion in the United States, serving more than 100 million US shareholders, and US\$7.0 trillion in assets in other jurisdictions. ICI carries out its international work through [ICI Global](http://www.ici.org/global), with offices in London, Hong Kong, and Washington, DC.

expanding the availability of multiple employer plans and raising the auto-enrollment safe harbor cap will further build on policies proven to work for our nation's savers. Other reforms such as repealing the maximum age for making traditional IRA contributions and increasing the age for mandatory distributions will better align policy with the reality that people are living longer today.

Due to its breadth, implementing the SECURE Act will require significant rulemaking and guidance from the Department of the Treasury ("Treasury"), Internal Revenue Service (the "Service"), and the Department of Labor. In addition to the needed interpretive guidance, our members have concerns requiring immediate attention from Treasury and the Service. Many of the Act's provisions became effective immediately or as of January 1, 2020. Our members, many of which provide plan administration services to retirement plans and offer IRAs, already are working to make the necessary systems changes to operate in compliance with the Act's provisions. Through this process, member firms have identified areas where immediate clarification—or, in some cases, short-term compliance relief—is crucial.

We are pleased that a remedial amendment period was included in section 601 of the Act for retirement plans and annuity contracts. The remedial amendment provision provides that plan or contract amendments needed to reflect changes under the legislation (including regulatory changes pursuant to the legislation) generally must be adopted by the last day of the first plan year beginning on or after January 1, 2022 (or a later date as provided by Treasury).² While this amendment relief is helpful, it does not resolve all operational concerns posed by the immediate effective dates.

We describe below the compliance relief or guidance urgently needed to implement specific provisions of the SECURE Act.

General Relief for Reasonable Good Faith Compliance

In addition to guidance on specified provisions, we request that Treasury and the Service provide general relief for good faith compliance efforts. In particular, Treasury and the Service should confirm that, in the absence of specific guidance, plan and IRA service providers can rely on a reasonable, good faith interpretation of the SECURE Act changes under the tax code.

Increased Age for Beginning RMDs (§114)

Section 114 of the Act increases the trigger age for taking RMDs, from age 70½ to age 72. The provision is effective for distributions required to be made after December 31, 2019, with respect to individuals who attain age 70½ after December 31, 2019. This extremely short window before the effective date of the change makes it very difficult for retirement plan and IRA administrators to make necessary systems changes in time for post-2019 compliance requirements. It is likely that some individuals will receive distributions from a plan or IRA in 2020 intended as RMDs under the prior rule and/or that an IRA

² Special deadlines apply in certain situations, such as for governmental plans (for which the deadline is the last day of the first plan year beginning on or after January 1, 2024).

provider will inadvertently provide an RMD notice for 2020 even though an RMD will not be due for that year.

As a result, guidance on how to handle distributions mistakenly processed as RMDs would be highly valuable. For example, Treasury and the Service might permit individuals to return such distributions to an eligible retirement plan, and if so, it would be helpful to provide corresponding rollover relief, with respect to both the 60-day deadline for indirect rollovers and the one-rollover-per-year limit for IRAs under Code section 408(d)(3).

In the event that an individual does not recontribute the distribution, we request that the Service provide relief with respect to a plan administrator's inadvertent violation of the income tax withholding rules under Code section 3405, resulting from the failure to apply mandatory 20 percent withholding on eligible rollover distributions (assuming the distribution is not subject to another exception from mandatory 20 percent withholding). In addition, the Service should provide relief with respect to the failure of a plan administrator to provide the special tax notice required under Code section 402(f) if the distribution is in fact eligible for rollover.³ The Service also should confirm that it will not penalize an IRA provider for providing an unnecessary RMD notice in 2020 in good faith based on prior law.

We also recommend that the Service issue a revised model 402(f) notice as soon as possible to reflect the new RMD age and any other relevant changes made by the Act (such as the new early distribution exception for qualified birth or adoption distributions).

Repeal of Maximum Age for Traditional IRA Contributions (§107)

Section 107 of the Act allows taxpayers to continue making contributions to traditional IRAs after reaching age 70½, effective for contributions made for taxable years beginning after December 31, 2019. The provision also reduces the amount of any qualified charitable distributions excluded from income if deductible contributions are made to a traditional IRA after age 70½, effective for distributions made for taxable years beginning after December 31, 2019.

With the short implementation window, IRA providers could in good faith reject contributions for individuals aged 70½ or older early in 2020, until their systems can be modified to reflect the change. We request confirmation that so long as an IRA provider is able to accept contributions by the end of 2020, the Service will not penalize it for failing to accept contributions before a reasonable time period for making necessary system changes.

³ Similarly, there may be circumstances resulting from SECURE Act changes in which a 402(f) notice is provided in error, based on a good faith interpretation of SECURE Act provisions or because a provider has not completed necessary programming changes to reflect SECURE Act provisions. For example, this could happen in the context of qualified birth or adoption distributions, as discussed below.

Modification of RMD Rules for Designated Beneficiaries (§401)

Section 401 of the Act modifies the RMD rules for post-death distributions from defined contribution (“DC”) plans and IRAs to designated beneficiaries. It requires the participant’s or IRA owner’s account to be fully distributed within 10 years following the year of the participant’s or IRA owner’s death, unless the distribution is made to an “eligible designated beneficiary” (e.g., a surviving spouse, a disabled or chronically ill individual, an individual who is not more than ten years younger than the participant or IRA owner, or a child of the participant or IRA owner who has not reached the age of majority). Eligible designated beneficiaries can continue to “stretch” RMD payments over life expectancy.

The provision is generally effective for RMDs with respect to participants or IRA owners with a date of death after December 31, 2019, although there are special rules for certain situations and a delayed effective date for governmental and collectively bargained plans.

These RMD changes raise numerous interpretive questions for guidance and clarification, some of which are coming to light.⁴ We expect Treasury to update its regulations on RMDs, a process that will take significant time and attention. In the short term, guidance or relief should address situations where a plan administrator or IRA provider provides beneficiaries with outdated information regarding the applicable RMD rules. As with the other SECURE Act changes, providers practically may be unable to update their communications by the effective date of this law change.

Exemption from Early Withdrawal Penalty for Qualified Birth or Adoption Withdrawals (§113)

Section 113 of the Act adds a new exception from the 10 percent early distribution penalty under Code section 72(t)(2) for qualified withdrawals from a DC plan or IRA for the birth or adoption of a child. Under the new exception:

- Qualified withdrawals are limited to \$5,000 in the aggregate across an individual’s accounts with respect to a birth or adoption.
- The withdrawal must be made within one year after the birth or adoption date.
- The distribution may be recontributed to an eligible retirement plan or IRA, subject to certain limitations, and is treated as a rollover.

The provision applies to distributions made after December 31, 2019.

Like the changes to post-death RMD rules for designated beneficiaries, this provision raises numerous interpretive questions necessitating guidance from Treasury and the Service. There are already questions relating to the application of the dollar limitation in the case of multiple births or adoptions occurring

⁴ Issues may include questions about the particular types of DC plans covered by the 10 year rule, documentation needed to administer RMDs in the case of trusts for disabled or chronically ill beneficiaries, successor beneficiary rules, and many others.

at the same time, whether any time limit for repayment of distributions will apply, and whether the new distribution opportunity is permissive or mandatory in terms of plan design, among others. Guidance on these issues is imperative before providers attempt to implement system changes.

First and foremost, Treasury should confirm that this provision creates a new in-service distributable event for plans (in addition to a new exception from the early distribution penalty). If the provision does create a new distributable event (i.e., a participant may take a qualified birth or adoption distribution even if not otherwise eligible for a distribution under the plan), it would be helpful for Treasury to provide:

- Confirmation that the new in-service distribution option is optional for a plan;
- Guidance on whether the distribution option is a protected benefit under Code section 411(d)(6);
- Guidance for plan administrators on applicable tax treatment in situations where a participant is eligible for both a qualified birth or adoption distribution and another distribution (such as a hardship distribution or a distribution upon severance from employment); and
- Confirmation that a plan administrator may rely on participant representations that the participant meets the requirements of a qualified birth or adoption distribution, without providing any “source” documents such as a birth certificate (e.g., it would be sufficient for the participant to state that a birth or adoption has occurred and that the participant will provide the child’s name, TIN, and other required information on his or her tax return).

In addition, detailed guidance is needed with respect to repayment of qualified birth or adoption distributions, including whether a time limit for making repayments will apply; confirmation that a plan is not required to accept repayment of such distributions (even if it accepts other rollovers); clarification on whether and how repayments must be tracked by the plan; and guidance on any circumstances where repayments include after-tax basis.

While guidance on these questions is needed as soon as possible, another immediate concern facing plan administrators and IRA providers is the likelihood that distributions in the coming months intended to be qualified birth or adoption distributions will be treated incorrectly until systems are updated to apply the correct tax treatment. In particular, a service provider may report and withhold income taxes from the distribution in compliance with prior law and provide the special tax notice otherwise required under Code section 402(f). For this reason, absent detailed implementing guidance, relief is needed for incidental non-compliance in the short term and for good faith compliance efforts. As explained earlier, it would be impractical for providers to make systems changes without answers to the questions outlined above.

Increased Cap under Automatic-Enrollment Safe Harbor (§102)

Section 102 of the Act increases the cap on automatic contribution rates for plans using the automatic enrollment safe harbor under Code section 401(k)(13)(C)(iii), from 10 percent to 15 percent (after the first year of enrollment). The provision applies to plan years beginning after December 31, 2019.

While this change is generally straightforward, there are immediate concerns for a safe harbor plan that incorporates the cap by reference to Code section 401(k)(13) in its plan document. We request that Treasury and the Service provide relief stating that a plan will not be disqualified or treated as noncompliant with the safe harbor if it changes its deferral rates operationally by the end of 2020 to reflect the increased cap.

Finally, it would be helpful to confirm that a plan using the safe harbor under Code section 401(k)(13) may cap automatic contribution rates at a rate less than 15 percent (but no lower than the applicable rate schedule set forth in section 401(k)(13)(C)(iii)).

* * *

We look forward to working with you to implement the many positive changes for savers included in the SECURE Act. If we can provide you with any additional information regarding these issues, please do not hesitate to contact David Abbey at 202/326-5920 (david.abbey@ici.org) or Elena Chism at 202/326-5821 (elena.chism@ici.org).

Sincerely,

/s/ David M. Abbey

David M. Abbey
Deputy General Counsel – Retirement Policy

/s/ Elena Barone Chism

Elena Barone Chism
Associate General Counsel – Retirement Policy

cc: William Evans, Office of Benefits Tax Counsel