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Filed Electronically

Ms. Carol Weiser Benefits Tax Counsel U.S. Department of the Treasury 1500 Pennsylvania Ave., NW Washington, DC 20220	Ms. Rachel Levy Associate Chief Counsel Internal Revenue Service 1111 Constitution Ave., NW Washington, DC 20224

Re: Issues for Priority Guidance Under SECURE 2.0 Act

Dear Ms. Weiser and Ms. Levy:

The Investment Company Institute[1] writes to request immediate guidance and relief relating to certain changes to the Internal Revenue Code ("Code") enacted under the Consolidated Appropriations Act, 2023 (CAA). As you know, the CAA (signed by the President on December 29, 2022) includes the SECURE 2.0 Act of 2022 ("SECURE 2.0 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, new options like the "Starter 401(k)" and enhanced tax credits for plan formation will lead to greater coverage by workplace savings plans. The Act supports a holistic approach to financial wellness by encouraging emergency savings and allowing employers to make matching contributions to retirement plans based on an individual's student loan payments. Additionally, the legislation will expand the use of pooled employer plans and raise catch-up contribution limits in key working years, building on policies proven to work for our nation's savers. Other reforms such

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of $29.7 trillion in the United States, serving more than 100 million investors, and an additional $8.1 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

as increasing the age for mandatory distributions will allow investments to grow for longer and give retirees more flexibility.

Due to its breadth, implementing the SECURE 2.0 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, 2023. 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 501 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, 2025 (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 or imminent effective dates.

We describe below the compliance relief or guidance urgently needed to implement specific provisions of the SECURE 2.0 Act.

1. Issues Needing Immediate Guidance

1.1 General Relief for Reasonable Good Faith Compliance

In addition to guidance on specified provisions described below, 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 2.0 Act changes under the Code.

1.2 Roth SIMPLEs/SEPs Permitted (§601) (effective for tax years after 2022)

Previously, simple retirement accounts (SIMPLE IRAs), described in Code section 408(p), and simplified employee pensions (SEP IRAs), described in Code section 408(k), were not permitted to be designated as Roth IRAs. Section 601 of the Act permits employers to offer employees the opportunity to have SIMPLE and SEP IRA contributions made as Roth contributions, effective for taxable years beginning after December 31, 2022.

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[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, 2027).

Updated model forms. In light of the 2023 effective date of this change, many employer sponsors of SIMPLE and SEP IRAs have indicated to ICI member firms their interest in permitting employees to elect Roth treatment. We ask Treasury and the Service to provide implementing guidance as soon as possible, including updated Forms 5304–SIMPLE, 5305–SIMPLE, and 5305-SEP (and other relevant Form 5305-series forms). Many of our member firms rely on the IRS model forms to offer SIMPLE and SEP IRAs. The relevant forms do not currently allow for Roth contributions, and until they are updated, some ICI member firms may find that they are unable to implement the Roth option. The Service should prioritize updating the forms or otherwise provide guidance on how IRA providers can accommodate the Roth option for those employers that want to offer it.

In this regard, it would be helpful for the Service to confirm that employers are permitted, but not required, to offer employees the option of designating a SIMPLE or SEP IRA as a Roth IRA. There is no logical interpretation of section 601 that would obligate an employer to offer Roth SEP or SIMPLE IRAs. Furthermore, as a practical matter, employers must have payroll systems in place to offer Roth contributions to an account, but many small employers use manual payroll processes.

Tax treatment. Implementing guidance also should address certain tax implications of employer contributions made on a Roth basis to SIMPLE and SEP IRAs, including the following:

- In which taxable year the contribution should be included in the individual's taxable income (for example, if the contribution is attributable to a prior year);
- Whether such contributions should be excluded from wages for purposes of withholding and other purposes;
- Confirm that such contributions are excluded from wages for purposes of FICA;[3] and
- How to report such contributions (e.g., on Form 1099-R, similar to reporting of in-plan Roth rollovers, and Form 5498).

For purposes of administrative simplicity, we believe that employer Roth contributions generally should be included in income in the year of contribution and that such contributions should be excluded from wages for withholding and other purposes, similar to the treatment of in-plan Roth rollovers of pre-tax contributions in a qualified plan. We recognize that Treasury may have concerns about potential under-withholding and any resulting underpayment penalties for individuals receiving Roth employer contributions. It is possible to address this potential problem through clear communications that an employee electing Roth treatment should consider adjusting their withholding or making estimated tax payments.

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[3] Pursuant to Code section 3121(a)(5)(H), Roth employer contributions to SIMPLE IRA plans should be excluded from wages for FICA purposes because they are not elective contributions under Code section 408(p)(2)(A)(i). Including Roth employer contributions in FICA wages would be inconsistent with the treatment of pre-tax employer contributions to SIMPLE IRAs, which are not subject to FICA withholding (at the time of either contribution or distribution). Code § 3121(a)(5)(H).

Drafting error affecting Roth IRA contributions. Finally, section 601 of the Act appears to include a drafting error, under which any contributions (Roth or pre-tax) made to a SIMPLE or SEP IRA would reduce the contribution an individual could make to a separate Roth IRA for that year. This is because section 601(a) of the Act removes section 408A(f) in its entirety from the Code. Removing Code section 408A(f)(1) was necessary to eliminate the prohibition against SIMPLE and SEP IRAs from being designated as Roth IRAs. However, Code section 408A(f)(2), which prevents SIMPLE and SEP IRA contributions from counting against the Roth IRA contribution limit, was also removed. We believe that this change was inadvertent, and that Congress did not intend this result. In anticipation of a technical correction to the statute, we urge Treasury to announce that it will apply the law consistent with its current regulations under Code section 408A and the expected technical correction. Because this issue impacts contributions for 2023, we ask Treasury to act expeditiously to mitigate the potential harm from this apparent glitch.

1.3 Roth Employer Contributions Permitted (§604) (effective on date of enactment)

Previously, plans could provide employer contributions only on a pre-tax basis. Effective as of the date of enactment, the Act allows sponsors of 401(k), 403(b), and governmental 457(b) plans to offer vested employer matching contributions and nonelective contributions on a Roth basis, at the election of the employee.

Tax treatment. This change raises issues similar to those described above with respect to Roth employer contributions to SIMPLE and SEP IRAs. Accordingly, we request guidance with respect to the following questions:

- In which taxable year the contribution should be included in the individual's taxable income (for example, if the contribution is attributable to a prior year);
- Whether such contributions should be excluded from wages for purposes of withholding;
- Whether such contributions should be excluded from wages for other purposes, such as applying various compensation thresholds for compliance testing;
- Confirm that such contributions are excluded from wages for purposes of FICA;[4] and
- How to report such contributions (e.g., on Form 1099-R, similar to reporting of in-plan Roth rollovers).

For purposes of administrative simplicity, we believe that employer Roth contributions generally should be included in income in the year of contribution and that such contributions should be excluded from wages for withholding and other purposes, similar to the treatment of in-plan

[4] Roth employer contributions should be excluded from wages for FICA purposes because they are not made under a qualified cash or deferred arrangement referenced in Code section 3121(v)(1). Including Roth employer contributions in FICA wages would be inconsistent with the treatment of pre-tax employer contributions, which are not subject to FICA withholding (at the time of either contribution or distribution). Code § 3121(a)(5)(A). Likewise, an in-plan Roth rollover of pre-tax employer contributions is not subject to FICA withholding.

Roth rollovers of pre-tax contributions. As explained in the previous section, we recognize that Treasury may have concerns about potential under-withholding and any resulting underpayment penalties for individuals receiving Roth employer contributions. It is possible to address this potential problem through clear communications that an employee electing Roth treatment should consider adjusting their withholding or making estimated tax payments.

Application of five-year holding period rule. Another relevant question is whether the five-year clock for determining qualified distributions from designated Roth accounts is applied separately for Roth employer contributions and employee designated Roth contributions. For purposes of simplicity, we recommend that time counted towards meeting the five-year period with respect to earlier employee designated Roth contributions should be counted for purposes of Roth employer contributions, and vice versa. In other words, there should be no distinction between employer and employee Roth contributions for purposes of the holding period.

Application to partially vested employees. Finally, section 604 requires that employer contributions made as Roth contributions must be nonforfeitable. It is unclear how this requirement impacts the ability of partially vested employees to elect Roth treatment for employer contributions. Treasury and the Service should clarify that partially vested employees may not elect Roth treatment for the vested portion of employer contributions made on their behalf.

We would appreciate guidance on these questions as soon as possible due to the immediate effective date of this provision.

1.4 Roth Catch-up Contributions (§603) (effective for tax years after 2023)

Section 603 of the Act places new restrictions on age 50 catch-up contributions under Code section 414(v). Effective for taxable years beginning after December 31, 2023, the Act requires all future age 50 catch-up contributions to a 401(k), 403(b), or governmental 457(b) plan to be made as Roth contributions, unless the employee earned $145,000 (indexed) or less in the prior year from the employer sponsoring the plan.

There are several issues associated with section 603 that warrant immediate attention. Although this provision is not effective until 2024, Treasury and the Service should prioritize guidance in this area. The number of open questions and the amount of work needed to implement required Roth catch-up contributions are significant. If plan service providers cannot implement the change in a timely manner, plan sponsors may be forced to remove catch-up contributions from their plans altogether, pending implementation guidance.

Drafting error precluding catch-up contributions after this year. As an initial matter, section 603 appears to include a drafting error, which could effectively preclude all catch-up contributions over the regular 402(g) limit beginning next year. This is because section 603(b)(1) of the Act removes subparagraph (C) from Code section 402(g)(1). Subparagraph (C) provides an exclusion for catch-up contributions' treatment as excess deferrals. Without this saving provision, catch-up contribution amounts that exceed the 402(g)(1) limit will be required to be distributed from the

plan and included in the plan participant's gross income. Therefore, a technical correction is needed to restore the ability to make catch-up contributions in 2024 and later years. This clearly was inadvertent given that this provision and other provisions of the Act (such as section 109) are predicated on the continued existence of catch-up contributions. In anticipation of a technical correction, we urge Treasury to announce that it will apply the law consistent with the expected technical correction.

Recharacterization of contributions as Roth catch-up contributions. Another issue raised by the Roth catch-up requirement relates to correction of failed actual deferral percentage (ADP) testing pursuant to Code section 401(k)(8). Under current rules, if a plan fails the ADP test, any excess contributions attributable to a highly compensated employee who is eligible to make age 50 catch-up contributions are reclassified as catch-up contributions as of the last day of the plan year, to the extent the individual's catch-up limit is not exceeded.[5] In light of the new Roth catch-up rule, to use this method of correction with respect to an employee with wages over $145,000, the plan would need to recharacterize the deemed catch-up contributions as Roth contributions. Treasury should provide guidance clarifying that such a later Roth recharacterization would be permissible.

Assuming that such a recharacterization (or any other recharacterization[6]) is permissible, a number of key issues remain unclear, including:

- in which year the contributions should be included in the employee's taxable income (for example, if the contribution is determined to be Roth catch-up in the year following the year in which it was deposited in the plan);
- whether the contributions should be excluded from wages for purposes of income tax withholding;
- whether the contributions should be excluded from wages for other purposes, such as applying various wages thresholds and compliance testing;
- how to report the contributions as income; and
- how to determine wages in connection with employer mergers or spin-offs in the prior year.

We request that Treasury and the Service clarify that pre-tax contributions that are later treated or recharacterized as Roth catch-up contributions should be:

- subject to income tax in the year that the contributions are treated/recharacterized as Roth contributions (which may be different than the year in which they were deposited in the plan);

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[5] Treas. Reg. §1.414(v)-1(c)(3) and §1.414(v)-1(d)(2)(iii).

[6] Note that an amount contributed to the plan on a pre-tax basis may be subject to recharacterization as a Roth catch-up contribution in other circumstances as well. For example, recharacterization may be necessary if an employee's wages for a prior year are determined or adjusted after the close of the year to exceed $145,000, or if a participant is determined to have exceeded the Code section 402(g) or other applicable plan limit following the contribution of a pre-tax amount to the plan.

- excluded from income tax withholding;
- excluded from wages for other purposes; and
- subject to reporting on Form 1099-R (though a de minimis reporting threshold exception should be established for amounts of $250 or less, based on the EPCRS de minimis correction exception for excess amounts).

The foregoing requested guidance would result in these amounts being treated the same as in-plan Roth rollover contributions. The subsequent treatment of a pre-tax contribution as a Roth catch-up contribution is effectively a transfer to a designated Roth account (as set forth in Code section 402A(c)(4)(E)) that an affected participant should be deemed to have elected by virtue of making their initial deferral election in an amount that exceeded the applicable limit on pre-tax elective deferrals.

Use of negative consent to change election. On a related matter, it would be helpful for Treasury and the Service to clarify whether, for individuals above the wage limit who elected to make catch-up contributions on a pre-tax basis, a plan can carry out their catch-up election on a Roth basis, by utilizing negative consent for example.

Relation to special catch-up contribution rules. Finally, we request confirmation that the Roth catch-up contribution requirement of section 603 does not apply to the special catch-up contributions permitted under Code section 457(b)(3) for participants within three years of normal retirement age or to the special 15-year catch-up contributions permitted under Code section 402(g)(7) for 403(b) plans. The Roth requirement should not apply with respect to these special catch-up contributions because they are not governed by Code section 414(v)—the provision that section 603 amends—and section 603 does not reference those special catch-up provisions.

1.5 Increased Age for Beginning RMDs (§107) (effective for 2023)

Section 107 of the Act increases the trigger age for taking required minimum distributions (RMDs), from age 72 to age 73 (and later to age 75). The provision is effective for distributions required to be made after December 31, 2022, with respect to individuals who attain age 72 after December 31, 2022. Similar to the situation in 2019 (when the SECURE Act increased the RMD age to 72), 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-2022 compliance requirements. It is likely that some individuals will receive distributions from a plan or IRA in 2023 intended as RMDs (and processed as RMDs) under the prior rule and/or that an IRA provider will inadvertently provide an RMD notice for 2023 even though an RMD will not be due for that year.

We appreciate the relief provided recently in Notice 2023-23 regarding the RMD statement financial institutions must furnish to IRA owners by January 31 if an RMD is due for that year. Notice 2023-23 states that the Service will not consider an RMD statement provided to an IRA owner who will attain age 72 in 2023 to have been provided incorrectly if the IRA owner is notified by the financial institution no later than April 28, 2023, that no RMD is actually required

for 2023. This relief is similar to the relief provided in Notice 2020-6 with respect to the prior RMD age increase in 2020 enacted under the SECURE Act of 2019.

Relief for distributions already taken. In addition to this relief for RMD statements, it would be helpful for Treasury and the Service to provide additional guidance that is modeled on the guidance issued in 2020 relating to distributions originally intended and/or treated as RMDs under the previously-applicable required beginning date. Specifically, we request guidance similar to Notice 2020-51, which provided that a distribution from a plan made during 2020 to a participant who attained age 70½ in 2020 that would have been an RMD but for the change in the required beginning date, was not required to be treated as an eligible rollover distribution (i.e., the payor and plan administrator were not considered as having failed to satisfy the requirements of Code sections 401(a)(31), 402(f)[7] and 3405(c) merely because of that treatment).[8] Notice 2020-51 also extended the 60-day deadline for rollovers, to assist plan participants who had already received distributions in 2020, and allowed an IRA owner or beneficiary who had received a distribution of an amount that would have been an RMD to repay the distribution to the distributing IRA (even if the repayment was made more than 60 days after the distribution) without violating the one-rollover-per-year limit for IRAs or the restrictions on rollovers for non-spouse beneficiaries under Code section 408(d)(3). We urge Treasury and the Service to grant this additional relief, which is as necessary today as it was in 2020.

Updated 402(f) notice. In addition to this transition guidance, we 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 numerous new early distribution exceptions).

1.6 Enhanced Plan Start-up Credit (§102) (effective for tax years after 2022)

Section 102 of the Act modifies the existing tax credit for small businesses that adopt a new qualified plan, effective for taxable years beginning after December 31, 2022. For employers with no more than 50 employees, the credit equals 100 percent (increased from 50 percent) of startup costs. For defined contribution plans an additional credit is provided, based on the amount contributed by the employer on behalf of employees earning FICA wages of $100,000 or less (indexed). This additional contribution-based credit is capped at $1,000 per employee and is available for five years, beginning with the tax year in which the plan is established.

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[7] This provision of IRS Notice 2020-51 provided 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 was in fact eligible for rollover. Similarly, there may be circumstances resulting from SECURE 2.0 Act changes in which a 402(f) notice is provided in error, based on a good faith interpretation of SECURE 2.0 Act provisions or because a provider has not completed necessary programming changes to reflect SECURE 2.0 Act provisions. For example, this could happen in the context of distributions following a federally declared disaster (section 331 of the Act).

[8] This guidance also addressed the waiver of RMDs for defined contribution plans and IRAs for 2020 included in Section 2203 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

Treatment of partners/sole proprietors. Our members have received questions relating to whether partners and sole proprietors are employees for purposes of determining the contribution-based credit. Because partners and sole proprietors are considered employees for purposes of being able to participate in a plan, and because section 102 does not specify that partners and sole proprietors must be excluded, it appears that they should be counted in determining the credit amount. We request that Treasury and the Service confirm this interpretation.[9]

1.7 Terminal Illness Distributions (§326) (effective for distributions after enactment)

Section 326 of the Act provides a new exemption from the 10 percent early distribution penalty in the case of a distribution from a plan or IRA to a terminally ill individual,[10] effective for distributions made after the date of enactment. A terminally ill individual must furnish "sufficient evidence" to the plan administrator "in such form and manner as the Secretary may require." The Act also allows the terminally ill individual to repay these distributions into an eligible retirement plan within three years.

Reliance on self-certification. Because terminal illness distributions are permitted as of the date of enactment, we request guidance as soon as possible that plan administrators and IRA providers may rely on self-certification from the individual as "sufficient evidence" of a terminal illness. Otherwise, a plan or IRA provider could be forced to make difficult (and potentially improper) inquiries into an individual's sensitive personal health information. Furthermore, financial institutions are not appropriately positioned to make determinations on health status or to maintain private health information. Similarly, a plan administrator or IRA provider should not be required to assess the veracity of any evidence of a terminal illness provided by an individual.

New distributable event. We also ask that Treasury confirm that section 326 provides for a distributable event that may be specified in a plan. If section 326 merely provided for an exemption from the 10 percent early withdrawal penalty, but did not provide for a distributable event, there would be no need for the plan administrator to receive any information regarding a participant's terminal illness. In this regard, Treasury should also clarify that a plan is not required to provide for distributions upon terminal illness in compliance with section 326.

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[9] We acknowledge that section 102's limitation to employees earning FICA wages (i.e., wages as defined in Code §3121(a)) of $100,000 or less would mean that individuals with self-employment income but no FICA wages would be counted regardless of their level of income. We anticipate that this apparent glitch will be addressed in a technical correction to the Act.

[10] A terminally ill individual means an individual who has been certified by a physician as having an illness or physical condition that can reasonably be expected to result in death in 84 months or less after the date of the certification.

1.8 IRA Charitable Distributions (§307) (effective for distributions in tax years after enactment)

Under existing law, an individual who has reached age 70½ may exclude from income up to $100,000[11] per year of otherwise-taxable IRA distributions to the extent they are qualified charitable distributions (paid directly from the IRA to a qualified charity). Section 307 of the Act expands the IRA charitable distribution provision to allow for a one-time, $50,000 distribution through charitable gift annuities, charitable remainder unitrusts, and charitable remainder annuity trusts, effective for distributions made in taxable years beginning after the date of enactment.

Application of dollar limits. The Act is not clear on how the new one-time $50,000 distribution relates to the $100,000 annual limit on qualified charitable distributions. We request clarification as to whether the two limits apply separately or whether a charitable distribution made pursuant to the new one-time election counts toward the $100,000 annual limit.

1.9 Partial Annuitization (§204) (effective as of date of enactment)

Section 204 of the Act directs Treasury to amend the regulations governing RMDs to provide that when an individual account plan participant uses a portion of their account to purchase an annuity, the plan may allow the employee to elect to have the RMD amount for a year calculated as the excess of (i) the total required amount for such year (i.e., treating the account balance as of the last valuation date in the immediately preceding calendar year as including the value on that date of all annuity contracts which were purchased with a portion of the account) over (ii) the total amount distributed in the year from all such annuity contracts. In other words, where annuity payments exceed the amount that would be required to be distributed based on the value of the annuity, the excess annuity payment amount can be applied towards the RMD for the year applicable to the non-annuitized portion of the account.

Annuity valuation. To take advantage of the flexibility this rule provides, individuals will need to know the fair market value of the annuity for each year an RMD is due. Having to consult an actuary each year to determine the annuity value will render this provision unusable for many individuals. Therefore, we urge Treasury and the Service to provide guidance that offers a valuation methodology that may be used if the insurer does not provide its own valuation. Taxpayers could be permitted to rely on any reasonable fair market value provided by the annuity issuer or plan, such as on a benefit statement or Form 5498.

[11] The Act also indexes the annual $100,000 cap for inflation for taxable years beginning after 2023.

2. Other Provisions Not Yet Effective But Needing Guidance as Soon as Possible

2.1 Allowance of Rollovers from 529 Plans to Roth IRAs (§126) (effective for distributions after 2023)

Section 126 of the Act allows tax free rollovers from 529 college savings accounts to Roth IRAs, provided certain conditions are met. Beneficiaries of 529 accounts will be permitted to roll over up to $35,000 over the course of their lifetime from a 529 account in their name to their own Roth IRA; however, the 529 account must have existed for at least 15 years. The rollover is subject to Roth IRA annual contribution limits and is further limited to the aggregate amount of contributions to the account (and earnings thereon) before the five-year period ending on the date of rollover. Treasury and the Service should consider providing guidance on several questions arising from this provision.

Fifteen-year clock. The statutory language provides that the rollover is permitted "[i]n the case of a distribution *from a qualified tuition program of a designated beneficiary which has been maintained for the 15-year period* ending on the date of such distribution" (emphasis added). It is not clear whether certain events, such as a change in beneficiary,[12] would cause the 15-year clock to restart. There are many reasons for a beneficiary change on a 529 account. Families with more than one child may use a single 529 account to save for college, changing the beneficiary to the second child attending college once they have finished paying for college for the first child. Parents may change the beneficiary if the child listed as the original beneficiary decides not to go to college or has leftover funds in the account after graduation. It is not clear in these instances what effect the beneficiary change will have when applying the 15-year requirement.

Furthermore, Treasury and the Service should confirm that the account owner is responsible for ensuring compliance with this aspect of the rule, because that is the party in the best position to know when the account was first opened. The 529 plan administrator will know when the account was opened with that particular financial institution, but in some cases, the original account may have been opened at another financial institution. Mergers and acquisitions can also affect the institution's knowledge regarding the original account, because a firm taking over custody of an account after a merger or acquisition may be required to "repaper" the account.

Application of IRA compensation limitation. Another question relates to the annual limitation placed on the amount that may be rolled over. New section 529(c)(3)(E)(ii)(I) provides that the special tax treatment "shall only apply to so much of any distribution as does not exceed the amount applicable to the designated beneficiary under section 408A(c)(2) for the taxable year

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[12] There are no income tax consequences if the designated beneficiary of an account is changed to a member of the beneficiary's family. For these purposes, the beneficiary's family includes the beneficiary's spouse and the following other relatives of the beneficiary: (1) son, daughter, stepchild, foster child, adopted child, or a descendant of any of them; (2) brother, sister, stepbrother, or stepsister; (3) father or mother or ancestor of either; (4) stepfather or stepmother; (5) son or daughter of a brother or sister; (6) brother or sister of father or mother; (7) son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law; (8) the spouse of any individual listed above; and (9) first cousin.

(reduced by the amount of aggregate contributions made during the taxable year to all individual retirement plans maintained for the benefit of the designated beneficiary)." While it is clear that the annual dollar limitation (e.g., $6,500 for 2023) applies, it is less clear whether the amount of the rollover also is limited by the beneficiary's taxable compensation for the year. A conservative interpretation would require that the beneficiary have taxable compensation in any year in which a rollover is completed.

Limitation on roll over of recent contributions/earnings. Our members also have questions regarding the limitation that amounts contributed within the preceding five years cannot be rolled over. New Code section 529(c)(E)(i)(I) provides that the rollover is limited to the amount that "does not exceed the aggregate amount contributed to the program (*and earnings attributable thereto*) before the 5-year period ending on the date of the distribution" (emphasis added). It is simple enough to keep track of any contributions made during the five-year period; however, segregating the earnings attributable to just those contributions (as opposed to earnings more broadly on the entire account) likely will prove to be more difficult. It may be helpful for Treasury to offer one or more safe harbors for compliance with this limitation. Certainly, if no new contributions have been made to the account in the last five years, the entire account should be eligible for rollover (subject of course to applicable dollar amount limits). If contributions have been made within the last five years, and there is no ability to identify earnings specific to those contributions, a possible safe harbor for the account owner to use in determining the amount eligible for rollover could be the account value as of the date five years prior to the rollover. This would not be a perfect proxy for the statutory formula, in the case of subsequent earnings and losses attributable to those contributions, but it could provide a reasonably workable solution.

Reporting questions. Finally, we request guidance on how these transactions should be reported on Form 1099-Q and Form 5498. We believe Form 1099-Q should be completed in the same manner as direct transfers between 529 plans.[13] More specifically, the box for trustee-to-trustee transfers (box 4) should be checked on Form 1099-Q. The recipient Roth IRA should report the contribution as a rollover contribution in box 2 of Form 5498.

We also request confirmation that, in the event that a 529 plan reports negative earnings on Form 1099-Q, the receiving Roth IRA would simply ignore the negative earnings and process the contribution only for the gross distribution amount. This seems to be the logical treatment, because negative earnings cannot be applied to the Roth IRA. The receiving Roth IRA will process earnings and basis together as one contribution and the beneficiary will not owe taxes on those earnings (nor carry over a separate basis amount) that will be provided on Form 1099-Q.

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[13] Rollovers from 529 plans to Roth IRAs will not be subject to the one-rollover-per-year limitation of Code section 529(c)(3)(C)(iii) because they are not rollovers "to another qualified tuition program." However, it would be helpful for IRS and Treasury to confirm this position, particularly if the new rollovers are reported in the same manner as direct transfers between 529 plans.

The provision is effective for distributions after December 31, 2023. While this provision is not immediately effective, it would be helpful to learn Treasury's positions on these questions soon, so our members can begin the systems changes that will be needed for implementation.

2.2 Automatic Enrollment Required for New Plans (§101) (effective for plan years after 2024)

Section 101 of the Act will require newly established 401(k) and 403(b) plans to automatically enroll participants (subject to certain exceptions), effective for plan years beginning after December 31, 2024. Plans established prior to the date of enactment of the Act are excluded from the automatic enrollment requirement, as are plans adopted by businesses in existence for less than 3 years and plans adopted by businesses that employ ten or fewer employees.[14]

This provision likely will require extensive guidance to implement and it will take time to fully evaluate the issues needing clarification. At the outset, we request guidance on the following questions that raise significant planning considerations.

Impact of mergers and spin-offs on grandfather treatment. As mentioned above, plans established prior to the date of enactment are grandfathered. In the case of a multiple employer plan (MEP), however, the Act specifies that employers that join an existing MEP after enactment are not exempt from the requirement to automatically enroll participants. Application of this rule is unclear when an employer sponsors a grandfathered plan (established prior to enactment) and merges that grandfathered plan into a MEP after the date of enactment. There are similar issues with respect to plans that are spun-off from a grandfathered plan. We urge Treasury to clarify that such a merger or spinoff will not result in loss of grandfather treatment because the merged plan (or spun-off plan) is merely a continuation of the grandfathered plan.

Timing of plan "establishment" for purposes of grandfather treatment. Further, it would be helpful for Treasury to clarify the meaning of "established" for purposes of determining eligibility for the grandfathering treatment. For example, if an employer adopted a plan prior to enactment of SECURE 2.0, but the plan was not effective until the beginning of 2023, we believe Treasury should clarify that such a plan should be considered as "established" prior to enactment. In this case, the actions necessary to set up a plan for the benefit of employees were performed prior to Congress enacting this significant new requirement for plan sponsors—a requirement which likely will have a meaningful impact on future decisions by employers to offer a plan. The expectations of such an employer should not be frustrated by the application of unexpected (and potentially expensive) new plan design obligations.

Identification of employees subject to automatic enrollment. Finally, for plans established after the date of enactment but prior to 2025, we request guidance on the issue of which employees are subject to the automatic enrollment requirement beginning in the 2025 plan year. It is unclear whether this requirement will apply only to employees becoming eligible for the plan in 2025

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[14] SIMPLE 401(k) plans and governmental and church plans also are not subject to the automatic enrollment requirement.

and later, or to all eligible employees (even those who became eligible prior to the automatic enrollment effective date).

2.3 New Types of Penalty-Free Withdrawals (§§ 115, 331, 314, 326, 334)

The Act adds several provisions that allow participants and IRA owners to take penalty-free early withdrawals, and in many cases, repay the amounts into an eligible retirement plan within three years. For example:

- Section 115 of the Act provides a new exception from the 10 percent early withdrawal penalty for certain distributions from defined contribution plans and IRAs for specified emergency expenses (unforeseeable or immediate financial needs relating to personal or family emergency expenses),[15] effective for distributions made after December 31, 2023. Individuals are limited to one distribution per year up to $1,000, with the option to repay the distribution within three years. No additional emergency expense distributions are permitted from a plan during the three-year period unless the amount of previous distributions is recontributed to such plan.

- Section 331 of the Act allows up to $22,000 to be distributed from employer retirement plans or IRAs for individuals affected by federally declared disasters, effective for disasters occurring on or after January 26, 2021. These distributions are not subject to the 10 percent early distribution penalty. Any portion of the distribution can be repaid to an eligible retirement plan at any time over the three-year period beginning on the day after the distribution was received. To the extent that the amounts are not repaid, the income with respect to the distribution will be included ratably over three taxable years, unless the individual elects not to have the ratable inclusion apply.

- Section 314 of the Act provides for a new type of penalty-free in-service withdrawal from defined contribution plans and IRAs for victims of domestic abuse meeting certain eligibility criteria,[16] effective for distributions made after December 31, 2023. The Act limits eligible distributions by an individual to the lesser of $10,000 (to be adjusted for inflation) or 50 percent of the account balance. Participants generally are permitted to repay such distributions into an eligible retirement plan within three years.

- Section 326 of the Act, as discussed earlier in this letter (see section 1.5 above), provides a new exemption from the 10 percent early distribution penalty in the case of a distribution to a terminally ill individual, effective for distributions made after the date of enactment. The Act also allows the terminally ill individual to repay these distributions into an eligible retirement plan within three years.

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[15] Plans generally may rely on certification from the individual that the distribution meets the criteria for emergency expense distributions.

[16] Plans adopting the provision are permitted to rely on a participant's self-certification of eligibility.

- Section 334 of the Act allows defined contribution plans to make distributions (up to $2,500 per year, indexed) used to pay premiums for certain specified long-term care insurance contracts, effective three years after the date of enactment. Distributions from plans and IRAs that meet the Act's requirements for "qualified long-term care distributions" are exempt from the 10 percent early distribution penalty.

Reporting guidance. Particularly for those provisions that are effective already (terminal illness distributions and federally-declared disaster distributions) or effective after this year (annual emergency expense withdrawals and domestic abuse victim withdrawals), payors would appreciate guidance on how to report these distributions on Form 1099-R, including the applicable distribution code(s) for Box 7.

Exclusion from anti-cutback rules. Further, to encourage plans' adoption of the new in-service distribution options, we urge Treasury and the Service to confirm that the new types of in-service distributions are not considered protected benefits subject to the anti-cutback rules. Such guidance would be consistent with Treasury regulations relating to hardship distributions, which provide that a plan will not be treated as violating Code section 411(d)(6) merely because it amends plan hardship rules and that a plan may be amended to eliminate hardship distributions.[17] Because the new distribution options are analogous to hardship distributions, they should similarly be excepted from the anti-cutback rules.

2.4 Additional Contributions to SIMPLE Plans (§§ 116 and 117)

Effective for taxable years beginning after December 31, 2023, the Act allows employers who sponsor SIMPLE plans to make contributions in addition to the currently required three percent match or two percent nonelective contribution, as additional nonelective contributions of up to ten percent of compensation (or $5,000 if less). Also effective for taxable years beginning after December 31, 2023, the Act increases the annual deferral limit to SIMPLE plans, and the catch-up contribution limit that applies at age 50 for SIMPLE plans, to 110 percent of the otherwise applicable limits in 2024 (and indexed thereafter). These increased deferral limits are available to employers with no more than 25 employees, and, for employers with more than 25 employees and not more than 100 employees, the increased limits are available only to those who make enhanced employer contributions on behalf of employees (either a four percent matching contribution or a three percent non-elective contribution).

Information needed to monitor compliance. Certain limitations associated with these new contribution provisions would present monitoring challenges for SIMPLE IRA providers and are more appropriately within the purview of the employer. More specifically, sponsoring employers are in a better position to determine compliance with (1) the ten percent limitation for additional employer nonelective contributions and (2) the different rules for increased deferrals that apply

[17] Treas. Reg. §1.411(d)-4, Q&A 2(b)(2)(x).

depending on the number of employees. It would be helpful for Treasury and the Service to acknowledge this practicality in any guidance issued to implement these provisions.

2.5 Treatment of Student Loan Payments as Elective Deferrals for Purposes of Matching Contributions (§ 110) (effective for plan years after 2023)

Section 110 of the Act allows employers to provide matching contributions under a 401(k), 403(b), SIMPLE IRA, or 457(b) plan on behalf of employees who make "qualified student loan payments." The employees must certify annually that they have made the loan payment. Section 110 directs Treasury to promulgate regulations to implement this provision, which is effective beginning in 2024.

Frequency of allocating matching contributions. Section 110(g)(1) states that the implementing regulations must permit "a plan to make matching contributions for qualified student loan payments…at a different frequency than matching contributions are otherwise made under the plan, provided that the frequency is not less than annually." To begin creating the systems necessary to implement this new plan feature, it will be important for our members to know as soon as possible the required frequency of allocating matching contributions on student loan payments. We urge Treasury to provide this guidance expeditiously and to permit the flexibility to allocate such matching contributions no less frequently than annually.

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We look forward to working with you to implement the many positive changes for savers included in the SECURE 2.0 Act. If we can provide you with any additional information regarding these issues, please do not hesitate to contact Elena Chism at 202/326-5821 (elena.chism@ici.org) or Shannon Salinas at 202/326-5809 (shannon.salinas@ici.org).

Sincerely,

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cc: William Evans, Office of Benefits Tax Counsel